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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

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UNITED STATES OF AMERICA, : CASE NO. 1:20-cr-142-DRC
:
Plaintiff, :
vs. : MOTIONS HEARING
:
ALEXANDER SITTENFELD, a/k/a :
"P.G. Sittenfeld," : 1:30 P.M.
:
Defendant. :
:

- - -

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DOUGLAS R. COLE
UNITED STATES DISTRICT JUDGE, PRESIDING
MONDAY, DECEMBER 5, 2022

- - -

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1 Also present: Alexander Sittenfeld, Defendant
SA Nathan Holbrook, FBI
2
3 Law Clerk: Jacob T. Denz, Esq.
4
5 Courtroom Deputy: Scott M. Lang
6
7 Stenographer: Mary Schweinhagen, RPR, RMR, RDR, CRR
United States District Court
200 West Second Street, Room 910
Dayton, Ohio 45402

8 Proceedings reported by mechanical stenography,
transcript produced by computer.

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01:35:06 1 P-R-O-C-E-E-D-I-N-G-S 1:35 P.M.

01:35:06 2 THE COURT: Good afternoon. We are here this
01:35:10 3 afternoon in open court and on the record in the Court's
01:35:13 4 criminal docket in the matter of the United States of America
01:35:14 5 versus Alexander Sittenfeld. It's Case Number 1:20-cr-142.

01:35:23 6 And it's the Court's understanding we're here for
01:35:25 7 argument on two motions: number one, defendant's motion for
01:35:32 8 acquittal, which is Document Number 270; and then defendant's
01:35:39 9 motion for a new trial, which is Document Number 271.

01:35:44 10 Could I have counsel please enter their appearances for
01:35:47 11 the record.

01:35:47 12 MR. SINGER: Good afternoon, Your Honor. Matt
01:35:51 13 Singer, Emily Glatfelter, and Meg Gaffney Painter for the
01:35:55 14 United States. Also at counsel table is special agent from
01:35:57 15 the FBI Nathan Holbrook.

01:35:59 16 THE COURT: Good afternoon.

01:36:01 17 MR. M. RITTGERS: Good afternoon Your Honor. James
01:36:03 18 Burnham, Thomas Hopson, Gus Lazares, Chars H. Rittgers,
01:36:06 19 Charles M. Rittgers for P.G.

01:36:11 20 THE COURT: Good afternoon.

01:36:11 21 MR. M. RITTGERS: Good afternoon.

01:36:12 22 THE COURT: All right. Well, Mr. Sittenfeld's team,
01:36:14 23 it's your motion. So please proceed.

01:36:19 24 MR. BURNHAM: Thank you, Your Honor. James Burnham
01:36:22 25 for Mr. Sittenfeld.

01:36:23 1 So, Your Honor, I'm going to focus on two issues this
01:36:26 2 afternoon: the Rule 29, the evidence of the agreement; and
01:36:29 3 then the constructive amendment as it relates to what we would
01:36:31 4 describe as the uncharged conduct involving Mr. Ndukwe.
01:36:35 5 Obviously, if the Court has questions about other stuff, we
01:36:37 6 will endeavor to answer them. Mr. Lazares will probably take
01:36:39 7 the lead on anything else that comes up.

01:36:41 8 Your Honor, politicians solicit and accept campaign
01:36:44 9 contributions every single day. They do so from donors with
01:36:47 10 business pending before them; they do so from donors who want
01:36:51 11 things from them.

01:36:52 12 The First Amendment protects this core political conduct.
01:36:55 13 There is a quote from *Citizens United* that I think nails the
01:36:58 14 point pretty well where the Court said, "It is well understood
01:37:00 15 that a substantial and legitimate reason, if not the only
01:37:03 16 reason, to donate to one candidate over another is that the
01:37:06 17 candidate will respond by producing those political outcomes
01:37:10 18 the supporter favors."

01:37:12 19 Federalism, I think, is also important when you're
01:37:15 20 talking about a local official like Mr. Sittenfeld. There was
01:37:17 21 a case argued in the Supreme Court one week ago called
01:37:21 22 *Percoco*, a corruption case that's not very similar on the
01:37:24 23 legal issue but broadly similar in some ways, and just as
01:37:27 24 Thomas observed at the beginning of the argument, quote, "It
01:37:29 25 seems as though we are using a federal law to impose ethical

01:37:33 1 standards on state activity." And I think that same
01:37:36 2 admonition would be very applicable here. That's why the
01:37:39 3 Court has said you need an explicit quid pro quo in the
01:37:43 4 context of campaign contributions.

01:37:45 5 So if I could, let me talk about this case for just a
01:37:47 6 second.

01:37:47 7 THE COURT: Would you agree, though, that if there
01:37:49 8 is an explicit quid pro quo, that everything you just said is
01:37:52 9 sort of immaterial at some level?

01:37:53 10 MR. SINGER: Yes. If there is an explicit quid pro
01:37:55 11 quo when the evidence is viewed through the Rule 29 standard,
01:38:00 12 then I think the conviction can stand. I think the real heart
01:38:03 13 of the discussion we will probably have today is, well, okay,
01:38:04 14 what does that mean? What is an explicit quid pro quo? And I
01:38:09 15 am happy to jump at that. I just wanted to make one more
01:38:11 16 quick point about this case.

01:38:12 17 THE COURT: Sure.

01:38:13 18 MR. BURNHAM: Your Honor, I just -- I'd like to
01:38:14 19 emphasize at the outset, I have read a lot of -- as I am sure
01:38:16 20 Your Honor has -- a lot of public corruption cases involving
01:38:18 21 campaign contributions. And I feel pretty confident saying
01:38:20 22 that this is the most aggressive campaign contribution case,
01:38:22 23 from the government's perspective, that I have ever
01:38:24 24 encountered. Blessing it will expand the law in a meaningful
01:38:28 25 way. None of the other cases have facts remotely like these,

01:38:31 1 and remotely as consistent as these are, with normal political
01:38:34 2 behavior as opposed to forming a corrupt agreement.

01:38:38 3 On the official act side, we have a bribe that the
01:38:42 4 government contrived in a sting operation to get a public
01:38:45 5 official who supported development across Cincinnati, to
01:38:47 6 support the most no-brainer real estate development project I
01:38:52 7 have ever seen.

01:38:52 8 I actually went over and looked at 435 Elm this morning
01:38:57 9 after coming last night after the Bengals game. It is hard
01:38:59 10 for me to believe that there is not a better use for that
01:39:01 11 property than a boarded-up building with a Hustler store on
01:39:02 12 the first floor. So giving somebody the support, that strikes
01:39:05 13 me as a fairly easy proposition.

01:39:07 14 Okay. So what was the bribe that the government
01:39:09 15 contrived to get him to do it? A completely lawful campaign
01:39:13 16 contribution.

01:39:14 17 Okay. So then what happened is exactly what the
01:39:15 18 government expected to happen and wanted to happen:
01:39:18 19 Mr. Sittenfeld agreed to support the development that he
01:39:20 20 obviously was going to support, indeed had previously offered
01:39:24 21 to support in a text exchange with the current tenant, the
01:39:27 22 name of whom I don't have in front of me -- there is a text
01:39:30 23 message. I can provide it to Your Honor. I'm sure you
01:39:33 24 remember it from trial -- and accept campaign contributions
01:39:36 25 that he was obviously going to need because he was about to

01:39:38 1 run for mayor.

01:39:39 2 There were six --

01:39:40 3 THE COURT: What you just said is he agreed to
01:39:43 4 support. That's what you just said, right?

01:39:47 5 MR. BURNHAM: Yes.

01:39:47 6 THE COURT: He agreed to support that. So if he
01:39:50 7 agreed to support it in exchange for campaign contributions --

01:39:54 8 MR. BURNHAM: Oh, yes.

01:39:55 9 THE COURT: -- that is a quid pro quo.

01:39:58 10 MR. BURNHAM: That would be, yes. That's not what I
01:39:59 11 meant to say, and if I said in exchange, I misspoke.

01:40:02 12 He certainly was happy to support the development. He
01:40:04 13 had been supportive of the development for a long time. He
01:40:07 14 separately was happy to accept campaign contributions. The
01:40:10 15 government has to -- the key to the whole case is showing that
01:40:13 16 there was an explicit linkage in his mind that his behavior
01:40:16 17 would be controlled to support the development by the campaign
01:40:20 18 contribution. Correlation is obviously not sufficient. I
01:40:24 19 mean, that comes from many, many cases, *McCormick*, et cetera.

01:40:27 20 What the government did when they designed the case was
01:40:30 21 that they took something that he was going to reflexively
01:40:34 22 support and then they provided campaign contributions and
01:40:37 23 asked the jury to infer, based on totally insufficient
01:40:40 24 evidence -- and we can talk about that -- that Mr. Sittenfeld
01:40:42 25 understood there was an agreement to exchange the two.

01:40:45 1 The reason that is so pernicious is, in almost every
01:40:48 2 corruption case I've encountered, the official act is
01:40:51 3 something obscure: It's, you know, a zoning variance. Help
01:40:54 4 me get a liquor license for this tavern.

01:40:56 5 THE COURT: We don't need an official act for both
01:40:59 6 of them, right?

01:41:00 7 MR. BURNHAM: I beg your pardon?

01:41:01 8 THE COURT: We don't need an official act -- I mean,
01:41:03 9 official act is not part of Count 3, right?

01:41:05 10 MR. BURNHAM: We would submit that for 666, you need
01:41:08 11 a full quid pro quo as the Fifth Circuit held in *Hamilton* and
01:41:11 12 the First Circuit held in the case -- the name of which
01:41:14 13 escapes me for the moment.

01:41:15 14 But setting that aside, I know under Your Honor's
01:41:18 15 instructions, we didn't find that. So -- but even there, you
01:41:20 16 still have to agree to be controlled in the way that you wield
01:41:22 17 your official power in a particular way. I mean, it can't
01:41:25 18 just be some sort of generalized thing: good will gifts -- I
01:41:28 19 hope you will do something nice for me down the road. I mean,
01:41:31 20 that's every campaign contribution, or many of them as we saw
01:41:35 21 from *Citizens United*.

01:41:36 22 And so the government -- but the point -- the only point
01:41:38 23 I was trying to make is that you have to think about, or I
01:41:40 24 would submit that the Court should think about this case
01:41:42 25 against the backdrop of something -- I know you don't have to

01:41:45 1 fulfill the official act for it to be a bribe. I know it's
01:41:48 2 not a defense that if you would have done it anyway, you know,
01:41:50 3 you can't cite that.

01:41:52 4 But there is something very unique when the government
01:41:55 5 goes out and picks something that they knew he would support,
01:41:58 6 that he was already on the record having supported, and says,
01:42:01 7 okay, we're going to give you campaign contributions to do
01:42:05 8 that, and this Rob character is going to continuously try to
01:42:08 9 link them in your recorded conversations while you are kind of
01:42:11 10 trying to steer away and circumvent the, you know, net that
01:42:14 11 we've put you in without doing anything wrong. That's just
01:42:17 12 the backdrop for the rest of the evidence.

01:42:19 13 The only other big-picture point I would like to make,
01:42:22 14 and then I am happy to turn to the details, \$16.7 billion --
01:42:26 15 with a "B" -- were spent on the elections in 2022. That is an
01:42:29 16 enormous amount of money. The Constitution, I would submit,
01:42:33 17 cannot tolerate lay juries being the only thing that stands
01:42:36 18 between public officials and, you know, prison time when we're
01:42:40 19 talking about legal, constitutionally protected campaign
01:42:44 20 contributions.

01:42:45 21 The courts have a very important role to play in this
01:42:48 22 context. I think if the courts don't play that role, it is
01:42:51 23 going to be a very constitutionally treacherous area.

01:42:54 24 THE COURT: I understand, but what is that role in
01:42:56 25 your view? I mean, generally speaking, when there are

01:42:59 1 ambiguous facts from which you could draw inferences one way
01:43:05 2 or another, it's the job of those people seated over there --

01:43:11 3 MR. BURNHAM: Right.

01:43:12 4 THE COURT: -- to deal with that. And I take it
01:43:13 5 from your papers that you're saying that's not true when we're
01:43:16 6 dealing with campaign contributions, and I'm struggling a
01:43:21 7 little bit with that. What -- what gatekeeper role do you see
01:43:25 8 for the Court when we're dealing with facts that could support
01:43:29 9 an inference that would give rise to criminality on the one
01:43:32 10 hand versus inferences that would give rise to a finding of
01:43:37 11 non-criminality on the other?

01:43:39 12 MR. BURNHAM: Right.

01:43:39 13 THE COURT: You know, just sitting here, I think of
01:43:42 14 that as a job for the jury, but I sense you're suggesting it's
01:43:45 15 not, so --

01:43:45 16 MR. BURNHAM: Well, so I guess what -- the way I
01:43:47 17 would think about it, Your Honor, is this: The Rule 29
01:43:50 18 standard, as you've very well articulated, says that we take
01:43:53 19 all the inferences in the government's favor and any inference
01:43:56 20 that can be drawn from the facts they get once the jury has
01:43:59 21 convicted, provided that the inference can clear the
01:44:02 22 reasonable doubt threshold, which it does have to clear even
01:44:04 23 in the Court's review. So it's kind of like summary judgment
01:44:07 24 on steroids. Okay, so that's the standard.

01:44:09 25 I think in this context you have a very, very

01:44:12 1 particularized legal role that requires that -- the government
01:44:15 2 to clear a high burden.

01:44:15 3 And, Your Honor, there was actually a decision that came
01:44:17 4 out just this morning that I'd like to give Your Honor, if I
01:44:20 5 may. It's from a district judge in the SDNY, Judge Oetken. I
01:44:25 6 gave the government some copies earlier.

01:44:28 7 May I give someone --

01:44:29 8 THE COURT: You may.

01:44:30 9 MR. BURNHAM: In this case, Judge Oetken dismissed
01:44:33 10 an indictment on the exact same issue we are here talking
01:44:36 11 about today. He said that there was not a sufficiently
01:44:39 12 alleged explicit quid pro quo -- I am happy to walk through
01:44:43 13 the decision. Probably more productive for Your Honor to just
01:44:46 14 read it when you have a minute. But here's the way that Judge
01:44:48 15 Oetken stated the rule, and then I will explain why the Sixth
01:44:48 16 Circuit's law is totally consistent with this.

01:44:52 17 Judge Oetken said, quote, "In the context of campaign
01:44:54 18 contributions, there must be a quid pro quo that is clear and
01:44:57 19 unambiguous, meaning that, one, the link between the official
01:45:00 20 act and the payment or benefit -- the pro -- must be shown by
01:45:04 21 something more than mere implication; and, two, there must be
01:45:08 22 a contemporaneous mutual understanding that a specific quid
01:45:12 23 and a specific quo are conditioned upon each other."

01:45:15 24 And that's from the opinion at page 23. And that was at
01:45:19 25 666 Hobbs Act -- I mean, 666, honest services case. That is

01:45:24 1 the legal rule that I think the Court has to apply. So under
01:45:26 2 the Rule 29 standard, the evidence has to suffice to satisfy
01:45:30 3 that rule. In that case, the judge was applying a standard
01:45:34 4 that Your Honor is very familiar with, the very differential
01:45:36 5 standard for dismissing indictments. And even there, Judge
01:45:39 6 Oetken said the government's allegations couldn't clear it,
01:45:42 7 even though they had done just as much as they did here in my
01:45:45 8 submission to try to link the two interactions with each
01:45:47 9 other.

01:45:47 10 The Sixth Circuit has given you a very similar
01:45:50 11 understanding of the test, I would submit. In *Blandford*, the
01:45:54 12 Court said it has to be, quote, "clear an understanding" --
01:45:57 13 "clear in understanding and neither obscure nor ambiguous."

01:46:00 14 So Your Honor had started by asking about ambiguous
01:46:03 15 evidence. In our view, if the evidence is ambiguous, it
01:46:06 16 cannot be sufficient as a matter of law to convict. Even if
01:46:09 17 the jury attempted to draw an inference from the ambiguous
01:46:11 18 evidence that there was some sort of linkage between the two
01:46:15 19 things. And that flows directly from *Blandford*, it flows
01:46:18 20 directly from *McCormick*, and it flows directly from the sort
01:46:21 21 of big-picture point that it cannot be that in a campaign
01:46:24 22 contribution case -- please, Your Honor?

01:46:25 23 THE COURT: Well, it's just, isn't -- I think I am
01:46:28 24 trying to find in your brief one spot -- it may have been in
01:46:32 25 the motion for a new trial -- you said something like, well,

01:46:36 1 if there's a plausible alternative explanation, you have kind
01:46:41 2 of got to credit that. And isn't it always the case, somebody
01:46:46 3 could come in and get up on the witness stand and say, oh,
01:46:49 4 yeah, I was joking. I mean, yeah, yeah, yeah, I said I
01:46:53 5 promised to do X in exchange for the money. It was a joke.
01:46:56 6 We all understood it was a joke. You know, we kind of all had
01:47:00 7 a big smile on our faces. And then somebody like you comes in
01:47:04 8 and says, well, there was a plausible alternative explanation,
01:47:07 9 so it really can't go to the jury. I'm struggling here a
01:47:10 10 little bit.

01:47:11 11 MR. BURNHAM: In Your Honor's framing, it doesn't
01:47:13 12 sound very plausible. And so I think what I would say is -- I
01:47:17 13 think the way I would think about it is you have to give them
01:47:19 14 all the inferences and apply the Rule 29 standard. But at
01:47:22 15 that point you are going to be left with a constellation of
01:47:24 16 facts.

01:47:24 17 And the Court has to say that it is not -- this was
01:47:27 18 unambiguous. I mean, that just comes directly from *Blandford*.
01:47:32 19 There is nothing ambiguous about what was going on here. This
01:47:34 20 evidence --

01:47:34 21 THE COURT: So "love you but can't."

01:47:37 22 MR. BURNHAM: Beg your pardon?

01:47:38 23 THE COURT: "Love you but can't."

01:47:40 24 MR. BURNHAM: I am happy to talk about that. And
01:47:42 25 now, of course, that was uncharged conduct, and we'll talk

01:47:44 1 about that at the constructive amendment point.

01:47:44 2 On "love you but can't," I think you have to -- let me
01:47:46 3 just go to my part of the outline where I talk about that
01:47:49 4 specifically.

01:47:49 5 So I think that statement doesn't work for a couple
01:47:52 6 reasons. So, first of all, that call, there is no
01:47:55 7 conversation about campaign contributions in any specific
01:47:58 8 sense at all. What leads up to him saying that is a long
01:48:01 9 conversation about how the current -- well, the then-current
01:48:04 10 mayor, Cranley had been retaliating against Mr. Ndukwe. So it
01:48:08 11 is a chat about how, you know, how are we going to make Chin's
01:48:11 12 life not unlivable in the next regime.

01:48:14 13 I think Mr. Sittenfeld saying you don't want me to not
01:48:16 14 get elected mayor, you don't want me to be like "love you but
01:48:20 15 can't" because I am just a private citizen, you know, having
01:48:22 16 some private citizen job, is not going to be a good outcome
01:48:25 17 for you, and I need to be able to raise money in order to be a
01:48:29 18 successful mayor.

01:48:30 19 There is nothing specific about any campaign donation at
01:48:33 20 all. It is a purely generalized statement about what's going
01:48:36 21 to happen down the road. And so -- if he doesn't become the
01:48:39 22 mayor. I don't think that's enough to be able to flip the
01:48:41 23 burden and say that the burden was satisfied.

01:48:43 24 Another way I would put it, Your Honor, that is an
01:48:46 25 extremely thin read in the greater context of this case to

01:48:50 1 infer an unambiguous corrupt agreement given everything else
01:48:54 2 that happened. And so I think if you -- if the government put
01:48:58 3 wires in the rooms with all the \$16 billion that had been paid
01:49:01 4 over the last two years for the elections, you would find a
01:49:04 5 lot of things that sound an awful lot like "love you but
01:49:07 6 can't." And I don't think that's going to -- that's enough to
01:49:09 7 say that there was -- you can say that Mr. Sittenfeld
01:49:12 8 understood that he was agreeing to have his official actions
01:49:14 9 controlled, which is the word that comes from -- that word
01:49:18 10 comes from *McCormick*, and an unambiguous way, which comes from
01:49:21 11 *Blandford*, to do the official act that Mr. Ndukwe wanted.
01:49:25 12 Because there's -- I mean, it's just too -- "I love you but
01:49:28 13 can't," I don't know what that means. It's just not clear
01:49:30 14 enough, you know, and they don't ever circle back to it --

01:49:34 15 THE COURT: "Love you but can't," I mean, I like you
01:49:36 16 but you can't pay the campaign contribution so I am not going
01:49:41 17 to support your project.

01:49:42 18 MR. BURNHAM: I don't think that's -- I think that
01:49:43 19 is one possible interpretation of what happened, but I think
01:49:46 20 there are others, even if you take the inferences in the
01:49:47 21 government's favor, because the conversation is just too
01:49:50 22 cryptic to be able to understand it as having -- as showing
01:49:53 23 even with the inferences.

01:49:55 24 THE COURT: But aren't the conversations always
01:49:56 25 going to be cryptic? Isn't that the nature of the beast?

01:49:59 1 MR. BURNHAM: Oh, no. I mean, I have read a lot of
01:50:01 2 these opinions, as I am sure Your Honor has, and they are
01:50:03 3 really not. In the campaign contribution context, they are
01:50:06 4 not cryptic. The judge in *Terry* is taking phone calls from
01:50:10 5 the donor and then ruling on motions, you know, right after
01:50:12 6 that in the afternoon. There is nothing unambiguous about
01:50:15 7 that. That's not coded language; that's not the nudging.

01:50:19 8 You know, the *Blagojevich* opinion, which I know Your
01:50:22 9 Honor is quite familiar with, nothing unambiguous was going on
01:50:23 10 with Governor Blagojevich. I mean, he was telling the aides
01:50:25 11 to tell the donor you are not going to get your permit unless
01:50:28 12 I get my donation. I mean, this is really clear conduct.

01:50:31 13 Here, you got a two-minute, three-minute phone call
01:50:34 14 between two guys who have known each other for ten years
01:50:37 15 talking about how the current mayor is terrible from the
01:50:40 16 perspective of Mr. Ndukwe and Mr. Sittenfeld reassuring him
01:50:43 17 that, you know, I need to be able to become the mayor and then
01:50:44 18 you won't have such an intolerable existence because I, unlike
01:50:49 19 he, you know, don't hate you.

01:50:50 20 And I just don't think you can say we can cherry-pick
01:50:52 21 that one sentence out of the two-year long case that was
01:50:55 22 presented in this courtroom and say, oh, that, that right
01:50:58 23 there, that's the explicit agreement, even though everything
01:51:00 24 else completely undercuts it.

01:51:03 25 And let's talk for a minute about the other evidence that

the government showered upon the jury. First, you know, the main quo was promoting Cincinnati investment. We have obviously talked about that.

Compliance with campaign finance law. In the government's view, the fact that Mr. Sittenfeld refused, I think it was, five different attempts, one of which I gather was inadvertent, by the FBI to give Mr. Sittenfeld noncompliant donations, the rejection of them was actually proof that he was guilty because -- only if he was trying to cover it up by making sure that the contributions came through in a lawful way.

I know Your Honor gave excellent instructions to try to mitigate the damage that that evidence caused, but I still think it is a troubling thing that we threw that kind of thing in front of a jury and said, oh, you know, this guy was trying to get donations from his PAC from an LLC and you can infer some sort of criminality from that.

They talked about his strategies to recruit potential donors. So they made a big deal out of the fact that he raised money from people with business pending before the city. Well, who do you think gives to municipal elections? You know, I have never given to a municipal election because I live in Alexandria, and, you know, it seems like everything's going okay and it's not my problem.

The people who give to local officials are the people who

01:52:09 1 have a direct economic stake in the city that they are going
01:52:12 2 to govern. So, you know, of course they are going to raise
01:52:14 3 money, and courts have said repeatedly that that's fine. But
01:52:16 4 the jury doesn't understand that. I mean, from the jury's
01:52:18 5 perspective, there is something wrong with that.

01:52:20 6 And so there is just all these other things that surround
01:52:23 7 the constitutionally protected conduct that the government can
01:52:26 8 use that to then say, oh, but that one little line, the "love
01:52:31 9 you but can't," that's the key to the whole case.

01:52:33 10 And I think if you go through these other opinions, and
01:52:34 11 they made a big deal about *Pawlowski*, the Third Circuit case
01:52:37 12 about the mayor of Allentown. Your Honor has to read the
01:52:39 13 district judge -- the district court opinion in that case.

01:52:42 14 Mayor Pawlowski, I mean, he was using burner phones
01:52:44 15 because he said they can't tap them. He was telling his aides
01:52:47 16 how he sweeps his office for bugs every day. He was telling
01:52:50 17 one of the donors, you know, we got to stop talking on the
01:52:53 18 phone. I mean, this was not -- it was very obvious what was
01:52:56 19 going on here.

01:52:57 20 And I think that's what Judge Easterbrook was talking
01:52:59 21 about in *Blagojevich*. It was certainly the case that the
01:53:03 22 winking and the nudging cannot defeat a prosecution when
01:53:07 23 everybody knows what's going on, when there's coded language
01:53:09 24 or something very clear. But that doesn't mean you can just
01:53:11 25 infer winks out of the ether and say, well, these guys were in

01:53:16 1 the room at the same time, and I know we have a video and I
01:53:18 2 know nobody's winking but, you know, the jury is still allowed
01:53:20 3 to infer that there was some sort of, you know, mesmeric
01:53:24 4 connection between those two people where they both understood
01:53:24 5 what was happening.

01:53:28 6 I mean, that's another thing about this case that's so
01:53:30 7 unique is Your Honor has -- we've all seen the same evidence.
01:53:33 8 It's all recorded. And so you can see exactly what happened
01:53:36 9 in each of these interactions. And I think it's very hard to
01:53:38 10 say, particularly when you watch the, you know, videotaped
01:53:41 11 interaction with Rob at the lunch and then the apartment, that
01:53:45 12 there was some kind of meeting of the minds here. I mean, Rob
01:53:48 13 is trying to talk about the deal, but they just spent an hour
01:53:51 14 talking about the real estate deal. And so when he starts
01:53:54 15 trying to talk about the deal as though it is some kind of
01:53:57 16 bribery deal, P.G.'s talking about, well, is the mayor going
01:54:00 17 to -- I mean, it's ridiculous.

01:54:01 18 But it's a good example too of how the government uses
01:54:04 19 word play to try to confuse things in the case. So they tell
01:54:07 20 the jury, oh, P.G. said that they want to invest in me. Okay,
01:54:09 21 he said "invest" because they are investors. And he assumes,
01:54:12 22 I'm sure, that that is how investors talk. What he means --
01:54:15 23 he does not mean invest in this bribery agreement. He means
01:54:19 24 invest in me as a candidate because I am going to win. I am
01:54:21 25 going to be the winning candidate, and I know you were worried

01:54:25 1 about supporting me because, you know, Chin supported the
01:54:27 2 other person in the last election and now he can't get a phone
01:54:29 3 call back from city hall. So don't worry about it, because
01:54:31 4 I'm going to win. You don't have to worry about retaliation
01:54:34 5 from my opponent. That's what he means by "invest."

01:54:37 6 But the jury doesn't know. And they suggest that he
01:54:40 7 meant they were investing in some kind of corrupt agreement.
01:54:42 8 The deal is even worse. I mean, if you watch the whole video,
01:54:44 9 nobody at lunch is talking about campaign contributions at
01:54:47 10 all, except in the most abstract sense. When P.G. asked
01:54:50 11 Mr. Ndukwe would it be appropriate -- he actually asks -- to
01:54:54 12 transition from talking about the project to talking about
01:54:56 13 politics, that he shows him his slides and all this stuff
01:54:59 14 about how he is going to win, there is like one little line
01:55:02 15 where he says, you know, in case, you know, Chin can get you
01:55:05 16 guys to support me. It's not until they go back to the
01:55:07 17 apartment and Rob starts trying to aggressively interject
01:55:11 18 campaign contributions into the discussion that they come up
01:55:13 19 at all.

01:55:14 20 So at the beginning, P.G. has no idea what's going on.
01:55:16 21 It's very clear from the video that he does not understand
01:55:18 22 that to be the deal. And then Rob keeps trying to come back
01:55:21 23 to it. And in the middle of the interaction, P.G. calls his
01:55:24 24 lawyer -- I guess he wasn't a lawyer, but he calls the
01:55:26 25 campaign compliance guy to ask him if he's okay to take the

01:55:30 1 cash. I submit that there will be no case in the *Federal*
01:55:33 2 *Reporter* where in the middle of the key interaction forming
01:55:36 3 the corrupt agreement the defendant called his lawyer and
01:55:38 4 asked his lawyer if he's allowed to accept his felonious bribe
01:55:43 5 in an LLC check or in cash or in a money order or in something
01:55:46 6 else.

01:55:47 7 Please.

01:55:47 8 THE COURT: I don't know. I mean, so if you're
01:55:52 9 concerned that a payment may be deemed by someone to be
01:55:58 10 illicit, maybe you want to make sure that the form is one that
01:56:01 11 it isn't likely to come to a regulator's attention because
01:56:04 12 once you start, you know, peeling away at the onion, you
01:56:06 13 get -- you get down a few layers and start hitting close to
01:56:09 14 home. So you're like, let's make sure we have dotted all our
01:56:13 15 i's and crossed all our t's --

01:56:15 16 MR. BURNHAM: Sure.

01:56:15 17 THE COURT: -- from a campaign law -- from a
01:56:17 18 campaign finance perspective, because if you start digging
01:56:19 19 away at this, it's not going to look good.

01:56:21 20 MR. BURNHAM: Right.

01:56:22 21 THE COURT: So we don't want anything that is bad on
01:56:24 22 the surface.

01:56:24 23 MR. BURNHAM: Two responses to that, Your Honor, one
01:56:26 24 big picture, one little.

01:56:27 25 The first is, I think that's a really good illustration

01:56:30 1 of how the defendant can't win when the government tries to
01:56:32 2 set him up. Because I guarantee you if he had taken the cash,
01:56:35 3 we would be having a much more difficult conversation right
01:56:37 4 now, where I would be trying to tell you that that also is --
01:56:39 5 I mean, it would have been a much worse case for P.G. So I
01:56:43 6 think that's the big-picture point.

01:56:44 7 The second point is, I just don't think that's plausible.
01:56:46 8 I mean, if you were going to take a corrupt bribe, okay, and
01:56:49 9 they want to give it to you in a bag of cash that you can use
01:56:52 10 to go out to lunch or dinner or do whatever you want with,
01:56:56 11 there is no world in which routing it through LLCs and putting
01:56:59 12 it on the PAC and all this other stuff is going to make your
01:57:01 13 life easier. All it's going to do is make it more likely that
01:57:05 14 somebody figures out what's going on and links them.

01:57:07 15 And on that point, can we talk a moment about
01:57:09 16 concealment? So the other theory behind all this was that he
01:57:12 17 was trying to hide the relationship with Rob. Your Honor,
01:57:14 18 I -- again, I suggest that you will never find a case in the
01:57:18 19 *Federal Reporter* where in the middle of the corrupt scheme the
01:57:20 20 defendant invited the bribe payors to a dinner party with the
01:57:23 21 sitting U.S. attorney. I don't think that that is going to be
01:57:26 22 something you find anywhere.

01:57:27 23 Now, they didn't go. Who knows what the dinner would
01:57:30 24 have been like. But it's just -- it's just incomprehensible
01:57:33 25 to me that if Mr. Sittenfeld had understood that this was a

01:57:36 1 corrupt relationship he would have done any of these things.
01:57:38 2 And I think that is the kind of stuff the Court has to think
01:57:40 3 about when it's trying to figure out whether there was an
01:57:43 4 unambiguous agreement here. Because when the record is so
01:57:47 5 totally, you know, not consistent with that inference, not
01:57:50 6 even the most, you know -- the jury is not allowed to draw
01:57:53 7 that inference when the evidence does not support it.

01:57:56 8 So unless Your Honor has questions, I can move to
01:57:58 9 constructive amendment.

01:57:59 10 THE COURT: Go ahead.

01:58:01 11 MR. BURNHAM: Yeah. Oh, actually, one more point,
01:58:02 12 Your Honor.

01:58:02 13 The only other thing I would say on kind of the evidence
01:58:05 14 specifically is that as the Court is well aware, under the new
01:58:07 15 trial rule, that you have the authority to grant a new trial
01:58:09 16 acting as the 13th juror, and that permits you to draw some
01:58:12 17 inferences. It's basically a lower standard for us than the
01:58:15 18 Rule 29 standard.

01:58:16 19 We obviously -- if Your Honor's not sure about everything
01:58:19 20 I've just said on the Rule 29 standard, we would suggest that
01:58:22 21 the Court should grant a new trial against the manifest weight
01:58:26 22 of the evidence for all the same reasons.

01:58:27 23 THE COURT: It's still an extraordinary remedy,
01:58:29 24 though, right?

01:58:30 25 MR. BURNHAM: Oh, absolutely. And I don't mean to

01:58:32 1 suggest that it's not. I just think this is an extraordinary
01:58:34 2 case.

01:58:34 3 Because I think that when you really get down to it --
01:58:38 4 and, obviously, the jury thought the evidence was not perfect
01:58:40 5 either, which is why they acquitted on four of the six counts,
01:58:43 6 and we will talk about the two, but when you really drill down
01:58:45 7 into the evidence, it is very hard for me to see how you can
01:58:48 8 cobble together an unambiguous, corrupt bargain between
01:58:51 9 Mr. Sittenfeld and Rob, who is the one that they charged it
01:58:54 10 with.

01:58:55 11 THE COURT: I mean, I think the corrupt bargain that
01:59:01 12 the government was trying to tell the jury existed was
01:59:04 13 something about deliver the votes in exchange for 20,000 or
01:59:09 14 40,000 or whatever in campaign contributions.

01:59:11 15 MR. BURNHAM: So that's certainly their position,
01:59:13 16 but the "deliver the votes" line, of course, is in this
01:59:16 17 apartment conversation where Rob is talking about the deal.
01:59:18 18 And P.G. clearly, clearly -- I mean, I have watched that video
01:59:22 19 ten times -- thinks he's talking about the real estate deal.
01:59:25 20 Remember, the backdrop for this is P.G. wants to redevelop
01:59:27 21 this blighted building that's a few blocks away. These are
01:59:30 22 big-time investors. It's like Mark Zuckerberg going to New
01:59:35 23 Newark, New Jersey, with Cory Booker.

01:59:36 24 So it's a big deal for the local official to bring in
01:59:39 25 redevelopment. It is a playbook -- and we've cited some

01:59:42 1 examples in our briefs -- for guys like P.G. They move back
01:59:43 2 to their hometown. They run for city office. They bring an
01:59:46 3 investment. And then they tout the investment as their
01:59:48 4 careers, you know, sort of take off.

01:59:49 5 So he is certainly trying very hard to convince Rob that
01:59:52 6 this is a good plan; that investing, well, I think it was \$1.4
01:59:55 7 million into the project will not be money wasted because they
01:59:59 8 will be able to get it the through the city council. I mean,
02:00:03 9 that's important. Rob is talking about putting 1.4 million
02:00:06 10 into Cincinnati, not into P.G. That's the deal. And then if
02:00:09 11 they get approval, he'll spend 75 million redeveloping the
02:00:12 12 property. That was the lunchtime conversation. That was what
02:00:14 13 it was all about. Is Mayor Cranley going to make me --

02:00:16 14 THE COURT: Let me ask it this way.

02:00:18 15 MR. BURNHAM: Please.

02:00:18 16 THE COURT: If -- if the situation was such that the
02:00:22 17 jury believed that if the campaign contributions were made
02:00:29 18 P.G. would -- Mr. Sittenfeld would support the deal, and if
02:00:36 19 the campaign contributions were not made Mr. Sittenfeld would
02:00:38 20 not record the deal, if that's what the jury believed the
02:00:41 21 evidence showed, that would be enough, right?

02:00:43 22 MR. BURNHAM: If the -- yeah, if the jury found that
02:00:46 23 Mr. Sittenfeld's support for the deal in his own mind was
02:00:48 24 contingent on obtaining the donations -- I gather that's Your
02:00:53 25 Honor's question?

02:00:53 1 THE COURT: Right.

02:00:53 2 MR. BURNHAM: Yeah, then I think we're -- yes, I
02:00:56 3 think then we lose.

02:00:56 4 THE COURT: So if --

02:00:57 5 MR. BURNHAM: If the -- I'm sorry. If the evidence
02:00:59 6 supported under the Rule 29 standard, not just if the jury
02:01:02 7 believed it for that evidence.

02:01:04 8 I think I misunderstood Your Honor's question.

02:01:06 9 THE COURT: If there is sufficient evidence from
02:01:08 10 which the jury could draw that inference and the jury, in
02:01:11 11 fact, drew that inference, putting aside your part about the
02:01:17 12 modification of the constructive amendment of the
02:01:20 13 indictment --

02:01:20 14 MR. BURNHAM: Yeah.

02:01:21 15 THE COURT: -- but just on the Rule 29 part, that
02:01:23 16 would be enough?

02:01:24 17 MR. BURNHAM: Yes, but only because I think we have
02:01:25 18 stipulated that the standard is satisfied.

02:01:27 19 I am not trying to fence with you. You are absolutely
02:01:29 20 right. The legal rule that Your Honor's articulated is one
02:01:32 21 that I am fine with, which is that Mr. Sittenfeld understood
02:01:34 22 in this hypothetical that he was -- his support for the
02:01:38 23 project was contingent on receiving the donation. That's --
02:01:41 24 that's the legal proposition?

02:01:42 25 THE COURT: Yes.

02:01:42 1 MR. BURNHAM: Yeah. As long as the evidence shows
02:01:44 2 that that is an unambiguous matter, I'm -- that as long as the
02:01:50 3 evidence under the Rule 29 standard is unambiguous that he
02:01:54 4 understood that, then I think that the law is satisfied. Or,
02:01:57 5 in other words, if it's clear in understanding, which is the
02:01:59 6 other line in *Blandford*, if there is enough evidence to find
02:02:03 7 beyond a reasonable doubt that the agreement that Your Honor
02:02:05 8 has hypothesized, or in your hypothetical the conditional
02:02:08 9 support is clear in understanding, then I think the standard
02:02:11 10 is satisfied.

02:02:11 11 THE COURT: I think where we are uncertain, isn't
02:02:15 12 that what you -- isn't that about what you tell the jury, not
02:02:18 13 about what you tell the Court? So, in other words, you tell
02:02:21 14 the jury that you shouldn't convict unless beyond a reasonable
02:02:27 15 doubt you find that there is a clear and unambiguous --

02:02:30 16 MR. BURNHAM: Yes.

02:02:30 17 THE COURT: -- agreement, right? And then the only
02:02:34 18 question for the Court on the back end if the jury has found
02:02:38 19 that is, is there evidence from which a rational jury could
02:02:44 20 have reached --

02:02:44 21 MR. BURNHAM: Yes.

02:02:44 22 THE COURT: -- the belief that there was a clear and
02:02:46 23 unambiguous arrangement?

02:02:48 24 MR. BURNHAM: Right, beyond a reasonable doubt.

02:02:49 25 THE COURT: Beyond a reasonable doubt. So if --

02:02:51 1 MR. BURNHAM: Yes.

02:02:52 2 THE COURT: -- any rational jury --

02:02:53 3 MR. BURNHAM: Yes.

02:02:53 4 THE COURT: -- could have found beyond a reasonable
02:02:56 5 doubt that there was a clear and unambiguous deal, that would
02:03:00 6 be enough?

02:03:01 7 MR. BURNHAM: Yes. I think what's sort of unusual
02:03:03 8 about this issue is that the criminality standard is
02:03:08 9 extraordinarily high. There are very few things -- maybe the
02:03:10 10 willfulness standard in tax fraud or something -- where the
02:03:13 11 government's burden on the substantive law side is as high as
02:03:18 12 it is here with an explicit agreement that's clear in
02:03:21 13 understanding and not ambiguous.

02:03:22 14 And so I think the problem is that I think what the Court
02:03:26 15 has to do is it has to take the evidence the way Your Honor
02:03:29 16 just said, but then it has to marry it up with that very high
02:03:33 17 legal standard and figure out if the jury just got this one
02:03:36 18 wrong. And I think the Court has an especially profound
02:03:40 19 obligation to do that here because of the First Amendment,
02:03:43 20 federalism, and other policy issues that are just infused into
02:03:46 21 this case.

02:03:47 22 Because at the end of the day, it's just not going to be
02:03:52 23 a very functional situation to have the Robs of the world
02:03:54 24 running around trying to give campaign donations, you know,
02:03:57 25 \$16 billion a year to federal officials, state officials,

02:04:00 1 local officials, and then say, well, he supported my bill at
02:04:03 2 the same time, and then throwing everything to the jury and
02:04:05 3 saying, well, you know, hopefully the 12 of you can figure it
02:04:08 4 out. I don't think that is what *McCormick* allows. I don't
02:04:12 5 think that's what the Sixth Circuit contemplated in *Blandford*
02:04:14 6 or *Terry*. I don't think it's what Judge Oetken --

02:04:17 7 THE COURT: But that was just what I was asking
02:04:18 8 about. So you think the Court has some special role to play
02:04:21 9 with regard to the clear and unambiguous part?

02:04:25 10 MR. BURNHAM: I wouldn't call it special, Your
02:04:27 11 Honor. I would say the rule is special. The rule for
02:04:29 12 *McCormick* is especially onerous for the government in a way
02:04:33 13 that it is much more so than in a personnel benefits case. I
02:04:37 14 mean, I think it's *Terry*. One of the cases talks about the
02:04:40 15 presumption of legitimacy that attaches to campaign
02:04:43 16 contributions. I think Judge Sutton called it a tax-free gift
02:04:46 17 or something like that, duty-free gift. That means the rule
02:04:50 18 is very demanding, but I don't think the Court does anything
02:04:53 19 different -- I'm sorry. You obviously have a question.

02:04:55 20 THE COURT: Well, I know, but the -- so when a rule
02:04:59 21 is demanding, a couple things could happen. One thing is you
02:05:03 22 can tell the jury the rule is very demanding and you need to
02:05:05 23 find beyond a reasonable doubt that the government met this
02:05:08 24 very demanding rule. And so what I said to the jury was, and
02:05:11 25 on that front the agreement, once again, need not be expressed

02:05:15 1 but it must be --

02:05:16 2 MR. BURNHAM: Right.

02:05:17 3 THE COURT: -- explicit; that is, the government
02:05:19 4 must show that the contours of the proposed exchange were
02:05:23 5 clearly understood by both the public official and the payor
02:05:27 6 even if the proposed exchange was not communicated between
02:05:30 7 them in express terms.

02:05:32 8 So that's sort of telling the jury it's a really
02:05:35 9 demanding standard and then the jury found that the really
02:05:39 10 demanding standard was met. And so I'm just -- I'm not -- I'm
02:05:45 11 not clear I'm following you on why then on the back end there
02:05:49 12 is also sort of a special heightened --

02:05:52 13 MR. BURNHAM: Oh.

02:05:53 14 THE COURT: -- obligation on the Court beyond I
02:05:56 15 sense you are saying the typical criminal case for what the
02:05:59 16 Court should do on the back end once you have instructed the
02:06:01 17 jury as to the really heightened standard.

02:06:03 18 MR. BURNHAM: I think I understand Your Honor's
02:06:05 19 question. So I don't mean to suggest you have a special
02:06:07 20 obligation on the back end. I think you have the same
02:06:09 21 obligation Rule 29 imposes on the Court in any criminal case,
02:06:13 22 which is to say, okay, does this evidence, taking all the
02:06:16 23 inferences, satisfy this legal standard, at least arguably --
02:06:20 24 I's say after the inferences, you have to say it does --
02:06:23 25 beyond a reasonable doubt, rationally.

02:06:25 1 And I don't think here the Court can draw that conclusion
02:06:27 2 for all the reasons we've been talking about, and I'm happy to
02:06:30 3 talk about it further, because I don't think the evidence in
02:06:32 4 this case is sufficient under the normal rules of procedure to
02:06:36 5 satisfy that very high legal standard, despite the fact that
02:06:39 6 the jury concluded that it did.

02:06:42 7 And, of course, that must be the case in some cases or we
02:06:44 8 would never have a post-verdict Rule 29 proceeding. So the
02:06:47 9 Court obviously has a role to play in superintending the
02:06:51 10 jury's verdict and figuring out whether it does, in fact,
02:06:54 11 comport with Rule 29.

02:06:55 12 THE COURT: But what I read your motion for
02:06:58 13 acquittal as saying is that because of the First Amendment
02:07:01 14 infused nature of all of this, that the Court does have a
02:07:04 15 special obligation. So that I -- that was just a misreading
02:07:07 16 of the motion then?

02:07:08 17 MR. BURNHAM: I guess -- I was trying to -- we were
02:07:11 18 trying to link that point to the nature of the rule. And to
02:07:15 19 show that sort of the quality of the evidence that can show an
02:07:19 20 explicit agreement has to be very clear, which is what
02:07:23 21 *McCormick* and *Blandford* say. And that that -- but that comes
02:07:26 22 on the substantive side, not the Rule 29 side.

02:07:29 23 THE COURT: Right. That's what I --

02:07:30 24 MR. BURNHAM: Totally. That is very much infused
02:07:32 25 with the First Amendment values.

02:07:33 1 When the Court looks at the record to figure out whether
02:07:35 2 there is unambiguous evidence of an agreement, I think the
02:07:39 3 First Amendment is part of the legal rule that you are
02:07:41 4 applying to the evidence. So the one way we described it at
02:07:43 5 one point is the evidence wouldn't be consistent with normal
02:07:46 6 political contact. I think Your Honor actually referenced
02:07:48 7 this earlier in the argument.

02:07:50 8 In order for the rule to be satisfied, the evidence has
02:07:53 9 to be of that quality, because otherwise, the rule is
02:07:55 10 meaningless. *McCormick*, in other words, contemplates that the
02:07:59 11 courts are going to be very active in enforcing this rule.
02:08:03 12 *McCormick* itself threw out a conviction based on, you know,
02:08:06 13 essentially temporal proximity between campaign donations and
02:08:10 14 official actions.

02:08:11 15 THE COURT: Here there is more than temporal
02:08:13 16 proximity, though. I agree with you temporal proximity isn't
02:08:17 17 enough. I agree with that.

02:08:17 18 MR. BURNHAM: I think it's maybe a scintilla. But
02:08:20 19 really, Your Honor, I really would resist the notion that
02:08:24 20 there is really anything more than that. I mean, the best
02:08:26 21 that they have got is this deal thing where Rob is trying to
02:08:28 22 transition from the real estate deal to the corrupt deal, and
02:08:31 23 P.G. clearly has no idea what he's talking about because no
02:08:35 24 one had talked about the corrupt deal as a deal in the
02:08:38 25 previous conversation. So I actually would resist pretty

02:08:40 1 strongly the idea that there is anything more than temporal
02:08:42 2 proximity here.

02:08:43 3 And then you have this one totally ambiguous thing with
02:08:47 4 Mr. Ndukwe before in the uncharged conversation, but I just
02:08:52 5 think that that, you know, pulled out of the record is not
02:08:54 6 nearly enough. And then against all that, you have all the
02:08:56 7 other behavior that is totally inconsistent with the corrupt
02:09:00 8 agreement.

02:09:00 9 And I do think the Court has to look at all of it. It
02:09:04 10 can't just say, oh, you know, this 30-second interaction, if
02:09:06 11 pulled out of all context, could be enough to support beyond a
02:09:09 12 reasonable doubt. That's not what Rule 29 says. Rule 29 says
02:09:12 13 that you look at all evidence in the record and assess
02:09:14 14 whether, after they get the inferences we talked about, there
02:09:16 15 is enough there to satisfy what I have described as a very
02:09:20 16 high standard.

02:09:21 17 And I am perfectly comfortable with the way *Blandford*
02:09:24 18 describes the standard, and I think the opinion we handed up
02:09:28 19 to Your Honor, you know, provides the articulation of the rule
02:09:29 20 as well. And I think once you apply Rule 29 to that rule,
02:09:33 21 looking at the whole record, it's quite clear to me -- and I
02:09:35 22 hope may be clear to you -- that the evidence does not satisfy
02:09:37 23 that very high standard.

02:09:39 24 Should I move to constructive amendment or --

02:09:43 25 THE COURT: Yeah, yeah.

02:09:45 1 MR. BURNHAM: Please, if you have --

02:09:46 2 THE COURT: Well, I am on page 7 of your brief, and
02:09:48 3 so I am trying to think about what the legal role you are
02:09:52 4 positing is and what the role of the Court is in that legal
02:09:56 5 role, and I get down to the sentence that says, "thus, when
02:09:58 6 the evidence permits a plausible explanation of the
02:10:03 7 defendant's conduct that sounds in politics instead of
02:10:07 8 corruption, *McCormick* is not satisfied."

02:10:09 9 MR. BURNHAM: Right.

02:10:10 10 THE COURT: So I take from that that in your -- in
02:10:14 11 your telling, there is some legal rule that if the evidence
02:10:21 12 permits a plausible explanation, the government loses as a
02:10:25 13 matter of law.

02:10:26 14 MR. BURNHAM: And what is implied here but not
02:10:29 15 stated, and may be the source of the disconnect, when the
02:10:32 16 evidence, after applying the Rule 29 standard to it. So when
02:10:35 17 the evidence, after taking all plausible inferences in the
02:10:38 18 government's favor, nonetheless, still permits a plausible
02:10:42 19 explanation of the defendant's conduct, then the rule in
02:10:45 20 *McCormick* is not satisfied.

02:10:46 21 At one point I described it as summary judgment on
02:10:50 22 steroids, and I think that's actually a fair way to think
02:10:52 23 about it. If the Court imagined that we were here in a
02:10:55 24 summary judgment posture rather than a post-verdict posture,
02:10:57 25 you could just take the evidence as you would in summary

judgment and then just, you know, match it up with the *McCormick-Blandford* test and see whether it would be enough, applying the higher standard of beyond a reasonable doubt, which the Court does have to apply, the same as it would apply to preponderance in summary judgment. So that's what I meant there. I didn't mean to suggest that you wouldn't apply the normal Rule 29 standard.

THE COURT: So first you take all the evidence, and then you take all the inferences that can be drawn from that evidence and throw them in the government's favor, and then you say, thus construed, does it permit a plausible alternative explanation?

MR. BURNHAM: Does it show an unambiguous agreement. I mean, that's just *Blandford*.

THE COURT: Right. So wouldn't -- let's just take one of them, the Ndukwe statement.

MR. BURNHAM: Sure.

THE COURT: "Love you but can't." So let's draw the inference in the government's favor that that statement should be understood as him saying, if you don't give me this money, I won't be able to support you. That's the inference the government wants to draw, and it says that inference is supported by that statement. So if that's an inference that's supported by that statement, isn't that in and of itself enough?

02:12:07 1 MR. BURNHAM: So two points, Your Honor. I
02:12:09 2 obviously disagree with the premise of the hypothetical --
02:12:10 3 THE COURT: Sure.
02:12:11 4 MR. BURNHAM: -- but that --
02:12:12 5 THE COURT: But there weren't any --
02:12:13 6 MR. BURNHAM: -- and perhaps the more important
02:12:15 7 point, I think you have to look at the entire record. And so
02:12:17 8 you can't just say, oh, this ten-second interaction is
02:12:21 9 where --
02:12:22 10 THE COURT: Doesn't it get worse rather than better?
02:12:24 11 I mean --
02:12:24 12 MR. BURNHAM: Oh, I don't know.
02:12:25 13 THE COURT: So that statement occurs in the context
02:12:28 14 where over the course of a multi-month period Mr. Sittenfeld
02:12:33 15 is meeting with people who have been portrayed to him as sort
02:12:37 16 of mob adjacent, you know?
02:12:43 17 MR. BURNHAM: That statement's before.
02:12:44 18 THE COURT: The statement -- that statement's
02:12:45 19 before, but I said it's in the context of a -- the beginning
02:12:48 20 of a multi-month interaction --
02:12:51 21 MR. BURNHAM: Sure.
02:12:51 22 THE COURT: -- where, you know, there's -- when you
02:12:55 23 look at the whole context, these are portrayed as being
02:12:57 24 relatively unsavory characters.
02:13:01 25 MR. BURNHAM: So I volunteered for a few political

02:13:05 1 campaigns, Your Honor. I mean, there's some colorful folks
02:13:07 2 out there. And so I don't know that we can say the fact that
02:13:10 3 the fake -- the fake characters are portrayed as being
02:13:13 4 unsavory is itself equivalent to him using burner phones or
02:13:18 5 some of the things you see in these other cases. I mean,
02:13:21 6 truly, I mean, all of the other corruption cases have stuff in
02:13:24 7 that --

02:13:24 8 THE COURT: But if you take -- so I am just thinking
02:13:26 9 about all the inferences --

02:13:27 10 MR. BURNHAM: Sure.

02:13:27 11 THE COURT: -- and drawn in all the government's
02:13:29 12 favor. So the inference is drawn all in the government's
02:13:32 13 favor is, I think, something like Mr. Sittenfeld is willingly
02:13:37 14 interacting with people he believes to be recently associated
02:13:44 15 with some form of organized crime, I think it's fair to say
02:13:48 16 from some of the comments that were made in the videos --
02:13:51 17 again, if we are drawing all the inferences in the
02:13:54 18 government's favor.

02:13:54 19 MR. BURNHAM: Yes.

02:13:55 20 THE COURT: Is soliciting or at least accepting
02:13:57 21 money from them in the same conversation in which he's
02:14:01 22 agreeing that, yeah, I can get a vote to my left or a vote to
02:14:05 23 my right, I can deliver the votes, I've always been able to
02:14:11 24 get, you know --

02:14:12 25 MR. BURNHAM: Right.

02:14:13 1 THE COURT: -- the majorities, I am always able to
02:14:15 2 get a lot of votes, I am the biggest vote getter, whatever, if
02:14:19 3 you draw all the inferences in the government's favor and look
02:14:23 4 at the whole interaction, you don't think there is enough for
02:14:27 5 a -- to show a deal?

02:14:29 6 MR. BURNHAM: No, not under the standard of
02:14:31 7 *McCormick* and *Blandford*, because I think under those cases the
02:14:35 8 Court -- the deal has to be clear in understanding from the
02:14:38 9 perspective of P.G. And I really don't think, even with
02:14:41 10 everything that Your Honor just put on the table, particularly
02:14:43 11 when included with the other things that we have talked about,
02:14:45 12 which the Court does have to consider. It's not as though the
02:14:48 13 Court just ignores the exculpatory evidence and looks only at
02:14:52 14 the inculpatory. It looks at the whole tapestry construed
02:14:56 15 through the Rule 29 standard.

02:14:57 16 And I don't think there is enough there, even with the
02:14:59 17 comment to Mr. Ndukwe that I still -- I mean, I don't think
02:15:02 18 it's at all clear what he meant in context, particular given
02:15:06 19 the backdrop of what we filed about that. There's enough
02:15:09 20 there for the Court to say, yes, it is completely clear,
02:15:10 21 beyond a reasonable doubt, taking these inferences in their
02:15:13 22 favor, that Mr. Sittenfeld understood that these payments were
02:15:14 23 being given to him in exchange for him supporting the
02:15:18 24 development at 435 Elm for Hobbs or, you know, generally
02:15:21 25 supporting our exploits in Cincinnati for 666. I just -- I

02:15:25 1 don't -- I don't think so.

02:15:26 2 And I think if you look at the other kinds of cases where
02:15:29 3 convictions have been upheld under those rules, the Court will
02:15:34 4 see evidence that is far more inculpatory than what the Court
02:15:36 5 has before it here.

02:15:37 6 THE COURT: What's your best case when we're --
02:15:39 7 where a case was taken away from the jury, where a guilty
02:15:42 8 verdict was overturned by the Court on Rule 29?

02:15:45 9 MR. BURNHAM: So I don't know of any cases in the --
02:15:48 10 on the *McCormick* issue where a verdict has been overturned by
02:15:52 11 Rule 29, but I just handed Your Honor a case where the
02:15:55 12 district court threw out the indictment, which, as you know,
02:15:58 13 as Your Honor knows, is an even lower standard for the
02:15:59 14 government than the one that they have to satisfy here because
02:16:01 15 there they can draft their own --

02:16:02 16 THE COURT: So other than the one you've just handed
02:16:04 17 me, you're not aware --

02:16:04 18 MR. BURNHAM: Well, to be fair, Your Honor, the
02:16:05 19 government doesn't bring pure campaign contribution cases very
02:16:09 20 often. It is very, very unusual for them to bring a case like
02:16:12 21 this without personal benefits. Because I think historically
02:16:16 22 that the government has realized that this is extremely
02:16:19 23 treacherous water to go sailing in, which is, of course, why
02:16:22 24 they tried so hard to get Mr. Sittenfeld to accept personal
02:16:25 25 benefits with the vacations and the UFC fights. I mean, it's

02:16:30 1 almost cartoonish when you go through the record how many
02:16:33 2 times they tried to get him to accept something. So there is
02:16:35 3 just not a lot of cases like this where the courts have a
02:16:38 4 person in front of them who only took donations, does not, you
02:16:41 5 know -- and hasn't engaged in other sorts of obviously corrupt
02:16:44 6 conduct.

02:16:45 7 I mean, they look -- the *Terry* decision by Judge Sutton,
02:16:48 8 I think that's one of our best cases. I mean, the behavior in
02:16:51 9 the *Terry*, as the Court well knows, is completely bizarre
02:16:53 10 behavior that does not permit any plausible inference. There
02:16:57 11 is no interpretation of what was going on, with the judge in
02:17:00 12 *Terry*, that is consistent with him not being on the take.

02:17:03 13 THE COURT: But as far as you know, this will be the
02:17:05 14 first court ever to overturn a jury conviction on the
02:17:08 15 arguments you are making here?

02:17:10 16 MR. BURNHAM: Let me check with Thomas when I sit
02:17:12 17 down. On the *McCormick* issue, it may well be. Of course,
02:17:17 18 Judge Oetken is -- as I say, has sort of shown Your Honor the
02:17:21 19 way, we would submit.

02:17:22 20 But there are certainly plenty of cases throwing out
02:17:25 21 corruption convictions. I mean, *McCormick* itself actually,
02:17:27 22 now that I think about it, threw out a conviction. So Your
02:17:29 23 Honor would be in good stead with Justice White and his
02:17:33 24 opinion in *McCormick*.

02:17:34 25 And then the Supreme Court throws out two or three

02:17:37 1 corruption convictions a year. I mean, the *Percoco* decision
02:17:39 2 that I just mentioned is going to be a 9-0 loss for the
02:17:42 3 department.

02:17:42 4 The *Ciminelli* decision, which was argued right after it,
02:17:45 5 not looking too good for them either.

02:17:47 6 *McDonald*, which I am personally very familiar with --

02:17:49 7 THE COURT: Another 9-0 loss.

02:17:49 8 MR. BURNHAM: -- another 9-0. Actually it was 8-0,
02:17:52 9 may God rest his soul.

02:17:53 10 THE COURT: That was a specific -- that was an
02:17:54 11 official act, right?

02:17:55 12 MR. BURNHAM: It's a different legal issue.

02:17:56 13 But the government's track record in the Supreme Court on
02:17:59 14 corruption cases is extremely poor, and most of those cases,
02:18:02 15 for good or ill -- and I have a lot of thoughts about that
02:18:05 16 separately -- come up in a post-trial posture.

02:18:07 17 The Supreme Court does not have any problem when they
02:18:09 18 think the government has gotten law wrong or the jury, you
02:18:12 19 know, didn't understand what was going on properly with
02:18:14 20 throwing out opinions.

02:18:14 21 And I don't see any reason why this case should have to
02:18:17 22 wait, you know, three more years for them to be able to do
02:18:20 23 that for Mr. Sittenfeld if they don't get to Mr. Benjamin
02:18:23 24 first. We will see if the government appeals.

02:18:25 25 So I guess that's my answer on that, subject to

02:18:29 1 supplementation after I talk to Thomas.

02:18:33 2 On the constructive amendment. Okay. Sorry. Catch my
02:18:33 3 breath.

02:18:37 4 As this Court recognized in its opinion on the motion to
02:18:40 5 dismiss the indictment, the indictment is a very important
02:18:43 6 document. It's, in fact, the critical document in a felony
02:18:46 7 case like this. It is not an illustration of the charges to
02:18:49 8 come, or whatever euphemism the government used in their Rule
02:18:53 9 33 brief. It is the charges. The Fifth Amendment requires
02:18:55 10 it. They cannot proceed, unless the defendant waives, without
02:18:59 11 getting an indictment from the grand jury.

02:19:00 12 And I actually think that this is about as
02:19:03 13 straightforward a case of a constructive amendment as the
02:19:06 14 Court's going to see. The indictment charges solicitation of
02:19:09 15 Rob, not Mr. Ndukwe.

02:19:10 16 Counts 3 and 4 have the same structure. They have the
02:19:13 17 jurisdictional allegations, then the substantive elements of
02:19:16 18 666 and the Hobbs Act, and then they allege the substantive
02:19:20 19 facts showing a violation. They both say, quote, "to wit,"
02:19:23 20 end quote, by soliciting payments from UCE-1, that is to say,
02:19:27 21 from Rob and only Rob, not Mr. Ndukwe. Critically, they do
02:19:31 22 not say soliciting payments from another person, which is the
02:19:34 23 language that the Court used in its jury instructions.

02:19:37 24 The indictment maybe could have been charged -- Your
02:19:42 25 Honor? I can put the indictment up, if you'd like. Do you

02:19:46 1 mind if I turn this thing on?

02:19:48 2 THE COURT: Are you talking Count 3 or Count 4?

02:19:51 3 MR. BURNHAM: Both.

02:19:52 4 THE COURT: "Accepted and agreed to accept the thing
02:19:54 5 of value from a person."

02:19:56 6 MR. BURNHAM: Are we looking at your instructions or
02:19:58 7 the indictment, Your Honor?

02:19:59 8 THE COURT: I'm sorry. The indictment.

02:20:01 9 MR. BURNHAM: Your Honor's instructions -- the
02:20:03 10 government may have been able -- here's the indictment. Sorry
02:20:04 11 for the notes. This is the indictment.

02:20:06 12 THE COURT: Okay.

02:20:07 13 MR. BURNHAM: So the indictment charges Rob only.
02:20:09 14 That's Count 3 above the header.

02:20:13 15 THE COURT: But look at the top line.

02:20:15 16 MR. BURNHAM: What top line?

02:20:17 17 THE COURT: Go up. There you go.

02:20:19 18 MR. BURNHAM: Yes. But then they have the "to wit."
02:20:22 19 So they have the general allegation of what the statute is,
02:20:24 20 but then they specified the way that it was actually --

02:20:27 21 THE COURT: Your whole thing comes down to whether
02:20:29 22 "to wit" somehow modifies the text above it, right?

02:20:33 23 MR. BURNHAM: It does. But I would -- the "to wit,"
02:20:34 24 I think, is actually quite clear. And we have a bunch of
02:20:37 25 positions where courts have drawn instructive amendments in

02:20:40 1 the exact same circumstance involving the "to wit," and we
02:20:41 2 have those in our brief. I mean, Your Honor --

02:20:42 3 THE COURT: Right. And then the government has one
02:20:44 4 where "to wit" was deemed not to be sort of a constructive
02:20:46 5 amendment.

02:20:47 6 MR. BURNHAM: Only in the Second Circuit. And the
02:20:49 7 Second Circuit I think has a weird rule that is totally
02:20:51 8 inconsistent with *Stirone* and some other decisions we can talk
02:20:55 9 about.

02:20:55 10 But let's just start first with what "to wit" means. "To
02:20:58 11 wit" just does not mean "for example." If you look in the
02:21:01 12 dictionary, you look in *Black's*, anywhere, it doesn't mean
02:21:03 13 "for example." It means "specifically." That's what the
02:21:05 14 phrase means.

02:21:06 15 So in order for the government to get out of its use of
02:21:09 16 the word "to wit," the phrase "to wit," it first has to
02:21:11 17 persuade Your Honor that it doesn't mean what it means, which
02:21:13 18 I think is wrong.

02:21:14 19 And then when you turn to the law, the government did not
02:21:17 20 have to put UCE-1 in this count. Maybe. I mean, they might
02:21:22 21 have been subject to a Bill of Particulars if they didn't, but
02:21:24 22 they probably would have survived the motion to dismiss with
02:21:26 23 just another person in there rather than UCE-1. But they did.

02:21:31 24 And the courts have held since *Stirone* that when they do
02:21:34 25 that, they are stuck with it. So what *Stirone* says is, quote,

02:21:38 1 "A court cannot permit a defendant to be tried on charges that
02:21:41 2 are not waived in the indictment against them." Then it goes
02:21:42 3 on to say, "When one particular kind of commerce is charged to
02:21:46 4 have been burdened, a conviction must rest on that charge and
02:21:48 5 not another even though it be assumed that under an indictment
02:21:52 6 drawn in general terms a conviction might rest upon either."

02:21:56 7 There's a great opinion by then-Judge Gorsuch -- I have a
02:22:01 8 particular fondness for -- in *United States versus Farr*, in
02:22:02 9 which he says the, quote, "settled rule" is that, quote,
02:22:04 10 "language employed by the government in its indictment becomes
02:22:07 11 an essential and deliberative part of the charge itself such
02:22:10 12 that if an indictment charges particulars, the jury
02:22:14 13 instructions and evidence introduced at trial must comport
02:22:17 14 with those particulars."

02:22:17 15 I think this is especially troubling in this case because
02:22:20 16 it actually, I think, pretty clearly explains the inconsistent
02:22:24 17 verdict. We're not objecting that the inconsistent verdict on
02:22:27 18 its own is some independent basis for reversal. I know the
02:22:30 19 courts have rejected that many times. But it shows you that
02:22:33 20 the variance, I think --

02:22:34 21 THE COURT: You gave a nod towards that in your
02:22:36 22 papers.

02:22:36 23 MR. BURNHAM: I think it's important to the extent
02:22:37 24 the Court reaches prejudice, prejudice in general is presumed
02:22:40 25 in the constructive amendment context. It's compelling

02:22:43 1 evidence of prejudice, and no court has rejected that. You
02:22:45 2 can't look at what the jury did to figure out whether the
02:22:47 3 amendment mattered.

02:22:49 4 Here, the indictment is clear as day about how these two
02:22:52 5 counts were committed. In one, they charge it the same way
02:22:54 6 but then they have the wire. So the wire, of course, is
02:22:57 7 carried forward in the instructions. So the jury -- I think
02:23:00 8 the inference is Your Honor was talking about "love you but
02:23:03 9 can't." It sure seems as though that's where the jury went.
02:23:05 10 And indeed that's where the government went in their closing
02:23:08 11 arguments. So the government in their closing arguments urged
02:23:10 12 the jury directly to convict Mr. Sittenfeld for the
02:23:14 13 interactions with Mr. Ndukwe.

02:23:16 14 So, I mean, you've kind of got it all. You've got --
02:23:18 15 you've got the indictment is clear. You have instructions
02:23:21 16 that are broader. You have got the government urging a
02:23:23 17 conviction on the uncharged count. That is a clear Fifth
02:23:27 18 Amendment violation. And nothing I have seen in the
02:23:29 19 government's brief distinguishes any of that.

02:23:32 20 And then their constructive amendment, I think, just kind
02:23:34 21 of ties it all together because it shows you that not only was
02:23:36 22 it a Fifth Amendment violation, but it's one that, you know,
02:23:39 23 it's one that actually mattered in this case.

02:23:41 24 THE COURT: But in Count 3, it starts by saying --
02:23:44 25 paragraphs 1 through -- I think it also said in Count 3,

02:23:47 1 right?

02:23:47 2 MR. BURNHAM: Yeah.

02:23:48 3 THE COURT: "Paragraphs 1 through 23 of the
02:23:49 4 indictment are incorporated here," and that includes --
02:23:53 5 doesn't that include the conversation with --

02:23:55 6 MR. BURNHAM: And I am not challenging, at least in
02:23:57 7 this argument, the Court's allowance of Mr. Ndukwe to testify
02:24:00 8 or the Court's permission for him to tell that story. The
02:24:04 9 problem is the grand jury did not indict P.G. for that
02:24:07 10 interaction. It didn't. If you look at the indictment --

02:24:09 11 THE COURT: Unless it's all part of -- I guess I am
02:24:11 12 thinking about, I think, one of the cases the government said,
02:24:14 13 I was trying to find, was one where there was -- you know,
02:24:17 14 somebody was alleged to have had illicit foreign accounts and
02:24:21 15 the indictment specified one foreign bank and one foreign
02:24:25 16 account; and instead at the trial, they proved that one or
02:24:30 17 proved another -- they also proved another foreign bank or
02:24:33 18 foreign account and, you know, they were just like, oh, well,
02:24:36 19 it doesn't really matter whether it was exactly the same one
02:24:39 20 as in the indictment or not.

02:24:40 21 MR. BURNHAM: So my guess is that was either one of
02:24:43 22 the Second Circuit cases or Judge Bea's very recent opinion in
02:24:46 23 the Ninth Circuit. Everything else is on the other side.

02:24:49 24 And there is a bunch of cases that are really, I mean,
02:24:51 25 really nitty-gritty about it. You know, the government will

02:24:54 1 allege felon in possession of a Mossberg shotgun, and then
02:24:58 2 they --

02:24:58 3 THE COURT: In the Seventh Circuit, right?

02:24:58 4 MR. BURNHAM: Yeah.

02:24:59 5 THE COURT: You know that case.

02:25:01 6 MR. BURNHAM: And so it is a very technical rule,
02:25:02 7 but it's not as though it's an unimportant one. I mean, the
02:25:05 8 Fifth Amendment gives Mr. Sittenfeld a right to have the
02:25:08 9 indictment pass upon these allegations before he's allowed to
02:25:10 10 even be brought into this room.

02:25:13 11 THE COURT: I understand. But the allegations
02:25:14 12 are -- I think the difference is the allegations are in the
02:25:18 13 indictment; they are just not in the "to wit" section.

02:25:22 14 MR. BURNHAM: Well, they are not in the crime. The
02:25:24 15 only crime that he was indicted for is the count, and the
02:25:28 16 count says, "to wit, soliciting Rob." Not "soliciting
02:25:32 17 Ndukwe."

02:25:33 18 THE COURT: Well, but further up -- that's why I
02:25:35 19 started further up. Further up it says the crime is agreeing
02:25:38 20 to accept money or something from another person. I don't
02:25:41 21 want to misquote here.

02:25:42 22 MR. BURNHAM: Right. But then it says "to wit,"
02:25:44 23 which means "specifically." So the government narrows the --
02:25:46 24 they have the general allegations, the background, the kind of
02:25:49 25 whatever, you know, historical stuff, and then they say

02:25:53 1 specifically -- I mean, imagine that it wasn't the sort of
02:25:55 2 antiquated language "to wit" but instead just said
02:25:59 3 "specifically," or, you know, "for example" -- not "for
02:26:02 4 example." Sorry.

02:26:02 5 But I think specifically is probably the best way to do
02:26:06 6 it, then you have got the specific crime that he is alleged to
02:26:08 7 have committed. He was not indicted for soliciting the --

02:26:10 8 THE COURT: But if this says "for his benefit from
02:26:12 9 UCE-1 and others," we wouldn't be having this conversation?

02:26:15 10 MR. BURNHAM: I would not be bringing this to Your
02:26:18 11 Honor. And I don't fault the Court's instructions. I don't
02:26:20 12 think we objected to the "any person" instruction.

02:26:23 13 THE COURT: I think you suggested it.

02:26:25 14 MR. BURNHAM: Did we? And I'm not suggesting --

02:26:28 15 THE COURT: Later on there was an objection to it.

02:26:30 16 MR. BURNHAM: Yeah. So I'm not suggesting that the
02:26:33 17 Court did anything wrong here. I am not suggesting --

02:26:37 18 THE COURT: I am not suggesting you are suggesting
02:26:38 19 that.

02:26:38 20 MR. BURNHAM: But when you match this up with the
02:26:40 21 instructions, the reality is the instructions are general and
02:26:43 22 this is specific. The government urged the general on the
02:26:46 23 jury, the uncharged conduct. That conduct was never indicted.
02:26:50 24 And I think if you look at Farr, *Stirone*, and a lot of other
02:26:55 25 cases we've cited, it's a pretty straightforward constructive

02:26:56 1 amendment.

02:26:57 2 And the Sixth Circuit role, by the way, is not any
02:27:00 3 different from the other cases -- let me find my cite here.

02:27:04 4 I can't find it. But I know it's in our brief. They
02:27:07 5 have not adopted the Second Circuit's kind of loose rule that
02:27:09 6 the indictment, you just kind of look at the gist, and as long
02:27:12 7 as the defendant understood the gist, that's fine.

02:27:14 8 They go with Gorsuch, and the Sixth Circuit is with
02:27:17 9 Justice Gorsuch, or then-Judge Gorsuch and everybody else.
02:27:20 10 And then when the government commits itself to a theory and
02:27:22 11 the grand jury indicts only on that theory -- they forwarded
02:27:26 12 the Sixth Circuit case, which is cited in our briefs that I
02:27:29 13 can commend to Your Honor. But when the government commits to
02:27:31 14 that, that's what the grand jury's tasked upon. And you
02:27:33 15 cannot convict someone for something the grand jury has not
02:27:36 16 indicted them for. And I just don't think there is any other
02:27:38 17 way to read those counts.

02:27:40 18 THE COURT: And the remedy for a constructive
02:27:42 19 amendment, if the Court were to find a constructive amendment?

02:27:44 20 MR. BURNHAM: I believe it's a new trial, and then
02:27:46 21 there may be a statute issue that we would have to have a
02:27:49 22 conversation about with them. They can retry -- I believe
02:27:52 23 they can retry on the same indictment. I can confirm this and
02:27:55 24 get back to Your Honor.

02:27:55 25 THE COURT: I saw the line in your --

02:27:57 1 MR. BURNHAM: It's a new trial basis. What I have
02:27:59 2 not thought through fully is the downstream implications of
02:28:02 3 that, but I am 99 percent sure they can retry on the same
02:28:05 4 indictment.

02:28:05 5 THE COURT: So when *Kuehne* says when proven -- a
02:28:08 6 constructive amendment when proven reads -- means the
02:28:11 7 defendant is entitled to reversal of his conviction, that just
02:28:14 8 means like vacate the conviction and new trial?

02:28:16 9 MR. BURNHAM: Yes, because there was an error in
02:28:19 10 trial that's per se prejudicial because it's constitutional
02:28:22 11 error. Some of this language is not how the courts talk as
02:28:26 12 much these days, but it's a sort of structural error. And the
02:28:29 13 court presumes prejudice, and then, you know, we can come back
02:28:31 14 and do it again if they want to. But that's that.

02:28:36 15 The only thing I would point Your Honor to is the
02:28:38 16 government talks about plain error. I have two responses to
02:28:40 17 that. First, we are raising it now. So I think, you know,
02:28:43 18 it's not -- probably not plain error because we are raising it
02:28:46 19 in district court with Your Honor at least now. So I would
02:28:48 20 just apply the rule straight. Even if the Court thinks it is
02:28:51 21 plain error because we didn't do anything earlier to sort of
02:28:54 22 bring this to your attention, I think the standard is clearly
02:28:57 23 satisfied.

02:28:57 24 There is a Tenth Circuit case called *United States versus*
02:29:00 25 *Miller*, very, very similar case. 891 F.3d 1220, 2018 case.

02:29:06 1 First, the indictment charged one false statement. The
02:29:08 2 government introduced evidence of two false statements on the
02:29:11 3 same form. I mean, truly, one form he had one box he checked
02:29:14 4 and one he didn't check. And the government introduced
02:29:16 5 evidence of both, said they were both false in closing, but it
02:29:19 6 only charged one. And the Tenth Circuit said that's plain
02:29:23 7 error. You can't do it.

02:29:24 8 The instructions were general. They just said that he
02:29:27 9 committed a false statement. Very, very, very similar facts.

02:29:29 10 THE COURT: Does the fact that you gave me that
02:29:32 11 citation means it's found in your brief --

02:29:34 12 MR. BURNHAM: I'm almost certain it's in our brief.
02:29:35 13 I'd be astonished if it's not.

02:29:35 14 THE COURT: Okay.

02:29:37 15 MR. BURNHAM: I just want to especially commend it
02:29:38 16 to Your Honor, that and the decision from the SDNY that I've
02:29:41 17 talked about at least five times.

02:29:41 18 THE COURT: Okay.

02:29:44 19 MR. BURNHAM: So unless Your Honor has any
02:29:45 20 questions, I can --

02:29:47 21 THE COURT: I don't, Mr. Burnham.

02:29:49 22 MR. BURNHAM: Thank you so much.

02:29:53 23 MR. SINGER: May I approach, Your Honor?

02:29:55 24 THE COURT: You may.

02:29:59 25 MR. SINGER: Thank you.

1 If I may, Your Honor, I'd like to start with the opinion
2 that was just published today that defense counsel provided
3 and puts a lot of weight in.

4 One thing I'd like to point out, on page 16, Footnote 6,
5 this Court recognizes that the law is different in the Sixth
6 Circuit, and *Blandford* sets out the appropriate standard in
7 determining the difference between "express" and "explicit."

8 It appears, although I have only read the first half of
9 it as I was sitting here, what the Court in this case said was
10 that "express" and "explicit" are the same. What the Court in
11 *Blandford* said is that "express" and "explicit" are different,
12 which is consistent with this Court's jury instructions.

13 In paragraph 16 -- I'm sorry -- page 16, Footnote 6, this
14 district court opinion recognized that the Sixth Circuit case
15 law is different. And so what turned the Court on this motion
16 to dismiss is fundamentally different than the law in the
17 Sixth Circuit.

18 Your Honor, starting with the Rule 29, the defendant
19 would like to apply a new law, this unambiguous quid pro quo
20 that was not in the Court's jury instructions, that they had
21 never raised at any point prior to trial, and use that as a
22 way to describe what an explicit quid pro quo is and then
23 apply their own plausible interpretation of the facts.

24 THE COURT: Well, wait. I'm not sure that's fair.
25 I mean, the jury instructions said, "The government must show

02:32:03 1 the contours of the proposed exchange were clearly understood
02:32:06 2 by both the public official and the payor." That's something
02:32:10 3 to do with unambiguous, isn't it?

02:32:13 4 MR. SINGER: Well, Your Honor, I think -- so the
02:32:16 5 word "unambiguous" is not in *McCormick*, it's not in *Evans*,
02:32:19 6 it's not in *Terry*, it's not in *Inman*.

02:32:22 7 THE COURT: Isn't clear -- "clearly understood"
02:32:25 8 something like "unambiguous"?

02:32:26 9 MR. SINGER: It is, but "express" is something like
02:32:28 10 "explicit." But there is a difference, and the Court is
02:32:30 11 instructed that there is a difference between "express" and
02:32:33 12 "explicit." And it does turn on the understanding of the
02:32:39 13 parties, but I think the actual language of *Blandford* is
02:32:42 14 instructive, Your Honor.

02:32:45 15 May I approach?

02:32:46 16 THE COURT: You may.

02:33:01 17 MR. SINGER: The only place in the defendant's brief
02:33:07 18 that lists out what -- that describes "explicit" as not -- as
02:33:13 19 unambiguous is Footnote 13 in the *Blandford* opinion. It's
02:33:20 20 important because Footnote 13 defines both "explicit" and
02:33:23 21 "express" as not ambiguous.

02:33:27 22 So "ambiguous" is not this term that all of a sudden
02:33:30 23 shines some new light on what it means to be explicit. If
02:33:34 24 "express" is not ambiguous and "explicit" is not ambiguous,
02:33:40 25 then -- and then the sentence that precedes this footnote to

02:33:44 1 which it's attached states, "evidence instructed that by
02:33:48 2 'explicit' *McCormick* did not mean 'express.'"

02:33:53 3 What matters is -- and I think the standard that the
02:33:58 4 Court laid out in the jury instructions, the standard that
02:34:00 5 this jury heard is set forth in *Blandford*. And that is, "The
02:34:10 6 quid pro quo on *McCormick* is satisfied by something short of a
02:34:12 7 formalized and thoroughly articulated contractual agreement."
02:34:16 8 That is in *Blandford*, "i.e., merely knowing the payment was
02:34:20 9 made in return for official acts is enough."

02:34:24 10 THE COURT: Are you reading from the --

02:34:25 11 MR. SINGER: I am reading from *Blandford*, Your
02:34:29 12 Honor.

02:34:29 13 THE COURT: Oh, okay.

02:34:30 14 MR. SINGER: "This is consistent with the Court's
02:34:31 15 instructions. Similarly, 'explicit,' as explained as
02:34:35 16 evidence, speaks not to the form of the agreement between the
02:34:37 17 payor and payee but the degree to which the payor and payee
02:34:42 18 were aware of its terms, regardless of whether those terms
02:34:45 19 were articulated."

02:34:46 20 What the Court is saying is the courts don't require, "I
02:34:50 21 am going to give you \$20,000 in exchange for votes, and you
02:34:54 22 are going to give me votes in return." That is not what is
02:34:57 23 required. But that is what --

02:34:59 24 THE COURT: What do you think is the quid pro quo
02:35:02 25 that the jury could have found here?

02:35:04 1 MR. SINGER: Your Honor, I think the November 7th
02:35:05 2 exchange is the clearest example. But, of course, all of
02:35:10 3 that, all the evidence has to be read together.

02:35:14 4 THE COURT: I understand. But what's -- what is
02:35:17 5 the -- what is the quid pro quo -- give me the quid and the
02:35:22 6 quo that you think that the jury -- the evidence the jury saw
02:35:27 7 supports.

02:35:29 8 MR. SINGER: \$20,000 in return for enough votes to
02:35:32 9 make a development agreement on 435 veto-proof. That is --
02:35:38 10 that is what was discussed at the November 7th meeting after
02:35:41 11 the lunch.

02:35:44 12 And -- but the jury, hearing that evidence, trying to
02:35:47 13 figure out what that means, interpreting it, has to do so in
02:35:51 14 the context of all of the evidence. And that includes the
02:35:54 15 October 30th exchange, the November 7th exchange in which a
02:35:58 16 very express quid pro quo was offered and the defendant said
02:36:03 17 why don't we meet in person. Nothing could be in quid pro
02:36:06 18 quo, let's meet in person, and we can talk about it and I can
02:36:09 19 give you comfort that you are investing wisely.

02:36:12 20 In that context, when you see Rob offers almost entirely
02:36:18 21 the same quid pro quo and the defendant says I can deliver the
02:36:23 22 votes, a rational jury could have heard this and said that
02:36:28 23 satisfied the standard as set forth in *Blandford*.

02:36:38 24 THE COURT: So what if -- what if Mr. Sittenfeld
02:36:42 25 says during the meeting: I'm voting for this one way or the

02:36:46 1 other. I would be happy to have your campaign contributions,
02:36:50 2 but this seems like a no-brainer for Cincinnati. You've got
02:36:53 3 my vote. I'd love to have your campaign contributions too.

02:36:58 4 Is that -- if that's the evidence, does it support --

02:37:04 5 MR. SINGER: Well, I mean, Your Honor, first of all,
02:37:07 6 can I -- can I take a step back from your hypothetical?

02:37:10 7 THE COURT: Sure.

02:37:11 8 MR. SINGER: Because those were not the facts here.

02:37:14 9 THE COURT: But you are going to find that with all
02:37:16 10 my hypotheticals. They are not going to be the facts that --

02:37:18 11 MR. SINGER: Well, it depends, Your Honor. Because
02:37:21 12 on the one hand, the fact that he would support the project
02:37:23 13 anyway, as we know, is not a defense. But if he took the
02:37:27 14 money knowing that it was in return, that knowing that it's a
02:37:31 15 bribe, then the statute is satisfied. I mean, that's
02:37:35 16 *Blandford*.

02:37:36 17 Merely knowing the payment was made in return for
02:37:39 18 official acts is enough. So if he's like, yeah, I'm going to
02:37:42 19 support this one way or the other, well, I want to really make
02:37:45 20 sure. So I am going to give you this money so that you -- and
02:37:48 21 this money is the bribe money. It's \$20,000 for your votes.
02:37:52 22 That's why I am giving it to you. And he accepts it with that
02:37:55 23 understanding, that's *Evans*, that's *Blandford*. Knowing that
02:37:58 24 this is a bribe payment and receiving it is sufficient.

02:38:01 25 I will say, though --

02:38:02 1 THE COURT: Mr. Burnham, would you agree with that?

02:38:05 2 MR. BURNHAM: I would just point out, Your Honor,
02:38:07 3 the part of *Blandford* that he is relying on is this is not a
02:38:10 4 campaign contribution case. *Blandford's* a personal payment
02:38:12 5 case.

02:38:13 6 To answer your question, I'm sure they think that that
02:38:15 7 would be enough for a corrupt agreement, but I certainly don't
02:38:17 8 think it's enough under the law. And, of course, that's what
02:38:20 9 happened here because Mr. Sittenfeld has lunch with Rob. And
02:38:23 10 he says if that's the details, it has my support, before
02:38:26 11 anybody talks about campaign contributions, before he asks
02:38:28 12 Mr. Ndukwe would it be appropriate if I bring out my little
02:38:32 13 PowerPoint about how I am going to win the mayoral election.
02:38:34 14 He says that.

02:38:34 15 THE COURT: So if a contributor says to a politician
02:38:38 16 "I am giving you this money because," intending it to be a
02:38:43 17 bribe, and the politician says, "You don't need to give it to
02:38:47 18 me. I am voting for it anyway," you are saying that would
02:38:50 19 not -- that would not be --

02:38:51 20 MR. BURNHAM: It's a little odd. The hypo maps
02:38:53 21 better onto the gratuity statute, which you can -- I don't
02:38:56 22 think it can even be constitutionally applied in this context,
02:38:59 23 but the Court's already said 666 is not a gratuity statute.

02:39:03 24 I don't know what it would be other than a gratuity if
02:39:06 25 the politician has already said you can't agree to do it

02:39:08 1 because of the bribe if you've already agreed to do it, right.
02:39:11 2 That's a gift for or because of the official act, which is a
02:39:14 3 gratuity. So I think that would be a gratuity, and that means
02:39:17 4 they lose.

02:39:18 5 MR. SINGER: Your Honor, that is the holding. The
02:39:19 6 Court in *Evans*, a campaign contribution case, the Court says,
02:39:23 7 "We hold that knowingly receiving a payment in return for
02:39:26 8 official acts is enough."

02:39:30 9 Receiving the money, knowing it's in return for official
02:39:33 10 acts. That's also entirely consistent with the Court's
02:39:36 11 instructions in this case in the 1951.

02:39:48 12 So *Blandford* is repeating what was said in *Evans* when
02:39:54 13 *Blandford* says, in the part that's highlighted in the copy
02:39:57 14 that I provided, "merely knowing the payment was made in
02:39:59 15 return for official acts." That is -- that is the Sixth
02:40:05 16 Circuit showing how *Evans* clarified *McCormick*. That language
02:40:08 17 is directly from *Evans*, "knowing the payment was made in
02:40:12 18 return for official acts."

02:40:13 19 That's how this case was instructed by the Court. That's
02:40:17 20 how the case was argued in closing arguments.

02:40:21 21 THE COURT: And I think the question is what does
02:40:23 22 the phrase "in return for" mean. Does it have the causal link
02:40:27 23 that Mr. Burnham was just suggesting so that a gratuity would
02:40:31 24 not meet the "in return for" part?

02:40:34 25 MR. SINGER: Your Honor, I encourage you to review

02:40:36 1 the language in *Evans*.

02:40:37 2 THE COURT: Okay.

02:40:38 3 MR. SINGER: It is square on point as to this issue,
02:40:40 4 and it's entirely consistent with the way the Court instructed
02:40:43 5 the 1951 in the elements section.

02:40:50 6 THE COURT: As to which element in 1951?

02:40:57 7 Oh, 1951. You are saying that's 5 and 6, right?

02:41:04 8 MR. SINGER: Yeah. Which, Your Honor, I will note
02:41:06 9 is a Sixth Circuit pattern instruction.

02:41:08 10 THE COURT: Yes. Counts 5 and 6.

02:41:36 11 MR. SINGER: This is PageID 3227, page 38 of the
02:41:40 12 Court's 1951 instructions, Element 3. "Third, the defendant
02:41:44 13 knew the property that he obtained, accepted, agreed to
02:41:47 14 accept, or received was being offered or provided to him in
02:41:49 15 exchange for either undertaking a specific official action or
02:41:52 16 him agreeing to undertake a specific official -- a specific
02:41:55 17 action."

02:41:56 18 So it's being provided, and it's being provided for this
02:42:02 19 purpose. That's receiving a bribe. You know it's -- a bribe
02:42:05 20 is being offered, and you are receiving it anyway. That
02:42:08 21 violates 1951. That is in the *Blandford* case as the defendant
02:42:13 22 relies on exclusively for its unambiguous challenge.

02:42:19 23 THE COURT: Okay.

02:42:20 24 MR. SINGER: The other point I would like to make,
02:42:22 25 Your Honor, is we heard a lot about lay jurors and what lay

02:42:26 1 jurors should be deciding. I think *Evans* is clear, *Blandford*
02:42:31 2 is clear, *Terry* is clear. We trust jurors to make this
02:42:35 3 decision. Your Honor provided the explicit quid pro quo
02:42:39 4 instruction. Eleven times in this Court's instructions did
02:42:42 5 you make -- use the phrase "explicit quid pro quo." You
02:42:45 6 defined it very clearly. The jury was instructed what an
02:42:50 7 explicit quid pro quo was.

02:42:52 8 They also received three pages or four pages of
02:42:55 9 instructions about what was not campaign contributions:
02:42:58 10 merely meeting with donors and talking about money and
02:43:02 11 official action in the same conversation. They received all
02:43:04 12 of that. They were well informed of what was not an explicit
02:43:09 13 quid pro quo.

02:43:10 14 With *Terry* and *Evans* and *Blandford*, all said, is we trust
02:43:15 15 jurors to make this call. They hear all the evidence, they
02:43:18 16 assess it, they draw all the reasonable inferences, and they
02:43:21 17 make the call.

02:43:22 18 THE COURT: I think what -- I think what Mr. Burnham
02:43:26 19 is saying, though, in the system in which politicians
02:43:32 20 routinely solicit and/or accept contributions from people who
02:43:38 21 may have business coming before that body, is it always going
02:43:44 22 to be the case that that means it's up to 12 jurors to decide
02:43:49 23 whether, notwithstanding anything that was said, there
02:43:53 24 actually was some agreement to do something?

02:43:57 25 I mean, I hear what you are saying about trusting juries,

02:44:02 1 but -- so no politician can accept money from anybody who is
02:44:06 2 going to have business coming before them on pain of leaving
02:44:11 3 it up to 12 of their peers to decide whether or not there
02:44:16 4 was -- an inference could be drawn that there was some illicit
02:44:19 5 deal?

02:44:20 6 MR. SINGER: Your Honor, they moved to dismiss the
02:44:24 7 indictment. The Court assessed whether or not the indictment
02:44:27 8 established the elements.

02:44:32 9 The next step is presenting the evidence, and then the
02:44:34 10 jury has to assess the evidence. That's what the trial is
02:44:39 11 for. If we didn't -- if there was not enough in the
02:44:41 12 indictment, then it would have been dismissed. If the jury --
02:44:47 13 otherwise, the Court -- the jury gets the instruction: This
02:44:50 14 is what the law is. Do these facts meet this law?

02:44:55 15 THE COURT: But would there -- I guess, would you --
02:44:59 16 would you concede that you may need something more than like
02:45:05 17 mere temporal proximity?

02:45:07 18 MR. SINGER: Absolutely.

02:45:07 19 THE COURT: If you just had temporal proximity in
02:45:10 20 the indictment, would that have been enough to --

02:45:12 21 MR. SINGER: Absolutely not, Your Honor, and that's
02:45:14 22 very clear. And the Court would have been -- probably would
02:45:16 23 have dismissed it at the Rule 29 in the middle of trial.

02:45:19 24 "Temporal proximity" means here's evidence that he
02:45:22 25 received a campaign contribution and here's evidence that he

02:45:25 1 took official action and they are close in time. Of course
02:45:31 2 without anything more than that, then it has to be dismissed.
02:45:34 3 Then it can't -- it didn't meet the Rule 29 standard. No
02:45:38 4 rational jury could find a conviction under that scenario.
02:45:41 5 That's not what --

02:45:42 6 THE COURT: Here the something more is Ndukwe --
02:45:47 7 Mr. Ndukwe's statement and the conversation that occurs on
02:45:49 8 November 7th?

02:45:51 9 MR. SINGER: Your Honor, yes, and other evidence.
02:45:56 10 There is -- the October 30th exchange, "love you but can't,"
02:46:00 11 that absolutely was as interpreted -- or how a rational jury
02:46:05 12 could interpret this evidence that paying a contribution was
02:46:11 13 tied to whatever action would have to happen with regard to
02:46:15 14 435 Elm when it's before the city.

02:46:17 15 The November 2nd call, again, a very expressed quid pro
02:46:22 16 quo. This guy wants to give you \$10,000 next week, but he's
02:46:26 17 going to want to know it's going to be a yes vote no matter
02:46:29 18 what.

02:46:30 19 The defendant himself admitted at trial that is an
02:46:34 20 express quid pro quo. This guy who is offering -- who wants
02:46:38 21 to offer you money when you meet with him next week intends to
02:46:41 22 offer you quid pro quo. He's a criminal, essentially. And
02:46:46 23 the defendant met with him anyway, said let's talk about it in
02:46:50 24 person, get him some confidence that he's investing wisely.

02:46:53 25 So it was not shocking when the same quid pro quo that

02:46:58 1 was offered on November 2nd was also offered on November 7th.
02:47:02 2 And his response was different that time. He said, "I'll
02:47:05 3 deliver the votes." A rational jury -- that is something more
02:47:08 4 than temporal proximity.

02:47:12 5 THE COURT: What about the uncharged conduct
02:47:15 6 problem, the "to wit" part of the indictment?

02:47:18 7 MR. SINGER: We're moving to the constructive
02:47:20 8 amendment part, Your Honor?

02:47:22 9 THE COURT: Well, it seems to come up here. I mean,
02:47:25 10 you just relied on Mr. Ndukwe's statement to sort of answer
02:47:29 11 part of my --

02:47:30 12 MR. SINGER: Indeed.

02:47:31 13 THE COURT: -- Rule 29 question. So I think that
02:47:34 14 leads into the indictment issue.

02:47:39 15 MR. SINGER: So I think a couple things here, Your
02:47:41 16 Honor. One, it bears actually looking at what was said in
02:47:46 17 closing argument. Closing argument, I think it's page 5035 or
02:47:51 18 PageID 5034 into 35, the closing argument was, the evidence
02:47:56 19 that you're going to hear for Counts 3 and 5, the 666 charges,
02:48:00 20 are the same as the evidence that you are going to hear, that
02:48:04 21 you have already heard, that we had already gone through with
02:48:07 22 regards to the honest services in the 1951. They are a
02:48:11 23 difference in the elements, but the evidence is the same.

02:48:16 24 When we got to the second element of the offense --

02:48:23 25 THE COURT: Which offense are we talking about?

02:48:25 1 MR. SINGER: This is the -- then we proceeded to go
02:48:26 2 through the elements of the 666 charge.

02:48:28 3 THE COURT: The 666. So that's Count 3 then.

02:48:31 4 MR. SINGER: Correct. So on PageID 5035, what was
02:48:37 5 stated at closing arguments was, you can consider the -- this
02:48:43 6 is what the element says. You can consider the checks that
02:48:47 7 were offered, you can consider the checks that were given, and
02:48:50 8 you can consider the solicitation of Chin, "love you but
02:48:55 9 can't." That is entirely consistent with what the indictment
02:48:58 10 says.

02:48:58 11 THE COURT: Except in the "to wit" part.

02:49:00 12 MR. SINGER: Your Honor, the "to wit" cannot be
02:49:02 13 read -- so I take umbrage with what the defendant said with
02:49:07 14 regards to what the import of the first 23 paragraphs of the
02:49:14 15 indictment that were incorporated. That is as if Count 3
02:49:18 16 follows the 23 paragraphs.

02:49:20 17 That's all part of the charge, and part of the charge is
02:49:26 18 the October 30th call, "love you but can't." It's all part of
02:49:30 19 a singular core of criminality. It's all part of the charge
02:49:34 20 that is part of Count 3. And that is what was said --

02:49:39 21 THE COURT: So you are reading "to wit" means "for
02:49:42 22 example"? It's not a limiting phrase?

02:49:44 23 MR. SINGER: So I think the Second Circuit certainly
02:49:46 24 found that, but I don't think that this Court needs to find
02:49:50 25 that in order to deny the defendant's motion on that ground.

02:49:54 1 The indictment -- the indictment itself, Your Honor, it
02:50:00 2 says, "corruptly solicited or agreed to accept payments from
02:50:07 3 the UC-1." It doesn't say the UC-1 was solicited. That has
02:50:12 4 to be -- that statement has to be read in the context of the
02:50:16 5 23 paragraphs that preceded it.

02:50:18 6 THE COURT: Well, I understand -- I guess I am
02:50:20 7 thinking about -- I can't come up with the case number. Maybe
02:50:26 8 Mr. Burnham can, but I think there was a case where a
02:50:29 9 defendant was charged with a 924(c) and the underlying drug
02:50:34 10 crime of distribution of cocaine, and I think he was also
02:50:37 11 separately charged in the same indictment, I think, but could
02:50:41 12 be wrong, with possession of cocaine. And then it turned out
02:50:45 13 that the way they tried to prove the 924(c) was based on
02:50:48 14 possession rather than distribution. And even though it was
02:50:52 15 all in the same indictment, I thought the Court said that
02:50:56 16 isn't going to work.

02:50:57 17 MR. SINGER: Your Honor, I have not seen a single
02:50:59 18 case in which a count incorporated facts into that count and
02:51:04 19 then those facts were proved at trial to establish that count
02:51:08 20 and there was a constructive amendment.

02:51:12 21 That is -- that is what happened here. The October 30th
02:51:16 22 was incorporated into the count. It is part of the charge as
02:51:19 23 to Count 3.

02:51:20 24 THE COURT: What's the case I'm talking about,
02:51:22 25 Mr. Burnham?

02:51:23 1 MR. BURNHAM: It's *United States versus Willoughby*,
02:51:25 2 Your Honor, twenty --

02:51:27 3 THE COURT: Is that *Willoughby*?

02:51:28 4 MR. BURNHAM: Yes, sir.

02:51:29 5 THE COURT: And am I right, there was both a charge
02:51:31 6 for possession and distribution in the indictment?

02:51:33 7 MR. BURNHAM: You're correct, Your Honor. And that
02:51:35 8 Court said "to wit" meant "to wit."

02:51:38 9 MR. SINGER: There were no facts relating to
02:51:40 10 distribution that were incorporated into that count, though,
02:51:43 11 Your Honor.

02:51:44 12 THE COURT: Possession, you mean.

02:51:45 13 MR. SINGER: Possession, that were incorporated into
02:51:47 14 that count.

02:51:47 15 THE COURT: You have seen the indictment in that
02:51:49 16 case?

02:51:49 17 MR. SINGER: I'm relying on the -- on what the
02:51:53 18 Seventh Circuit held.

02:51:54 19 THE COURT: So what did *Willoughby* -- I don't have
02:51:57 20 it in front of me, I don't think.

02:51:59 21 So *Willoughby* said that the reason it wasn't going to
02:52:01 22 allow the possession to work was because the count, that
02:52:06 23 924(c) count didn't include the facts relating to possession?

02:52:12 24 MR. SINGER: Indeed, Your Honor.

02:52:14 25 THE COURT: Do you have a specific pin cite for

02:52:18 1 that?

02:52:33 2 MR. SINGER: I do not standing here, Your Honor.

02:52:35 3 I will say that the Court -- nowhere did it mention the
02:52:38 4 fact that there were -- my reading of the case, Your Honor, is
02:52:45 5 that there was no description of possession.

02:52:51 6 THE COURT: I think it charged possession.

02:52:53 7 MR. SINGER: It charged using the gun in relation to
02:52:55 8 the drug offense.

02:52:56 9 THE COURT: Well, it charged 924(c) and said, to
02:53:00 10 wit, using the gun in connection with distribution of cocaine.
02:53:03 11 I believe the indictment also separately charged possession of
02:53:05 12 cocaine, and I think at trial the government proved the use of
02:53:10 13 the gun in connection with possession rather than
02:53:13 14 distributing, and I think the Court in *Willoughby* said that
02:53:16 15 isn't going to cut it, because that's a constructive amendment
02:53:20 16 because your underlying crime that you proved at trial to
02:53:23 17 support the 924(c) was different than the one you to wit'd in
02:53:28 18 the indictment.

02:53:28 19 Mr. Burnham's standing up, though.

02:53:30 20 MR. BURNHAM: Yes. I just want to agree with Your
02:53:33 21 Honor. The quote is, "A conviction that rests, no matter how
02:53:34 22 comfortably, on proof of another offense cannot stand."

02:53:38 23 THE COURT: Right. But I take your point,
02:53:41 24 Mr. Singer, to be that here the count itself incorporated the
02:53:47 25 very facts on which you were relying in part to support the

02:53:52 1 conviction, and you are suggesting that maybe if I look at the
02:53:56 2 indictment in *Willoughby*, the facts supporting the possession
02:54:00 3 charge won't be in there; or is the difference that with
02:54:08 4 924(c), you actually need a specific crime as an element of
02:54:12 5 924(c); whereas, here you don't need the thing that was to
02:54:19 6 wit'd in this indictment as an element because the elements of
02:54:23 7 the offense is just a person. It doesn't need to be a
02:54:26 8 specific person?

02:54:26 9 MR. SINGER: I think that's right. But also, Your
02:54:28 10 Honor, the facts that were alleged in 1 through 23 are not
02:54:33 11 inconsistent with what is in the "to wit" section. The
02:54:39 12 paragraphs that allege above are that -- I think it's
02:54:43 13 paragraph 12, there is a discussion on October 26 where
02:54:48 14 Mr. Ndukwe says, listen, I've got these UCEs. They are
02:54:52 15 willing to contribute.

02:54:53 16 This is in a follow-up from the September 21st where
02:54:57 17 Mr. Sittenfeld solicited Mr. Ndukwe. There was a call on
02:55:00 18 October 26th. I've got these UCEs -- he didn't use that
02:55:07 19 phrase. I've got these UCEs. They want to contribute. They
02:55:11 20 want to set up a time to meet before the change of law on
02:55:15 21 November 7th.

02:55:15 22 The follow-up call on November 7th -- or on October 30th
02:55:18 23 was my guy can't get here before the deadline. UCE-1
02:55:22 24 specifically can't get here before the deadline.

02:55:25 25 So the facts in the indictment are saying the money that

02:55:29 1 you are soliciting, that you want from me, is going to come
02:55:31 2 from UCE-1. And that leads to the "love you but can't" and
02:55:36 3 then the November 7th -- 2nd, the November 7th, and the
02:55:41 4 introduction of the relationship of UCE-1.

02:55:44 5 So the payments, even from the calls on October 26th and
02:55:47 6 October 30th, were going to come from UCE-1.

02:55:50 7 The indictment, the "to wit" section doesn't say
02:55:53 8 "corruptly solicited directly from UCE-1." There was a
02:55:57 9 corrupt solicitation, and the payments came from UCE-1,
02:56:01 10 ultimately. There was corrupt solicitation and a demand and
02:56:04 11 acceptance and agreement to accept payments from UCE-1. This
02:56:10 12 is -- this is a matter --

02:56:11 13 THE COURT: If the jury convicted him solely based
02:56:16 14 on the Ndukwe comment and not based on anything that happened
02:56:20 15 on November 7th or anything else, that wouldn't be consistent
02:56:23 16 with the to "wit part," right?

02:56:24 17 MR. SINGER: It would be, Your Honor. The
02:56:26 18 solicitation on October 30th is relating to payments from
02:56:29 19 UCE-1. It's all part of this core of criminality. It's all
02:56:32 20 part of this singular episode that is laid out in paragraphs 1
02:56:37 21 through 23 and then incorporated into Count 3. It's all part
02:56:43 22 of the charge.

02:56:45 23 The "to wit" section, maybe inartfully, mushes it all
02:56:49 24 together. There is the solicitation, the acceptance -- the
02:56:53 25 demand, acceptance, and agreement to accept payments to the

02:56:57 1 PAC from -- or for his benefit from UCE-1. So the payments
02:57:01 2 ultimately came from UCE-1. That was clear in the --

02:57:04 3 THE COURT: Only the first 10,000 from Mr. Ndukwe
02:57:08 4 was going to be the UCE-1?

02:57:10 5 MR. SINGER: All the payments, yes. Maybe that's
02:57:12 6 what I am maybe inartfully trying to say.

02:57:14 7 Paragraphs 12 and 13 are clear: The payments that I am
02:57:17 8 anticipating giving you, Mr. Ndukwe says, is going to come
02:57:21 9 from UCE-1.

02:57:25 10 And so when all of the different ways 666 can be violated
02:57:31 11 are scrunched together in the "to wit" section, after
02:57:35 12 incorporating all those paragraphs in 1 through 23, that line
02:57:40 13 is entirely consistent with everything that's been
02:57:43 14 incorporated into that count. And that is entirely consistent
02:57:47 15 with the way that that was described in closing arguments.

02:57:50 16 Essentially, when you're looking at 666, you can consider
02:57:56 17 the October 30th "love you but can't" call. That's evidence
02:58:01 18 you can consider.

02:58:02 19 For the Court to say that it's constructive amendment or
02:58:04 20 by a prejudicial variance where the very facts that were cited
02:58:10 21 in the closing argument and presented at trial were expressly
02:58:15 22 set forth in the indictment and incorporated into the count,
02:58:18 23 there is not another case that has held that.

02:58:25 24 THE COURT: Okay. So the conversation "love you but
02:58:39 25 can't" occurs on October 30th; is that right?

02:58:42 1 MR. SINGER: That's correct.

02:58:49 2 THE COURT: That was after the two investors have
02:58:51 3 already been introduced into this conversation, UCE-1 and
02:58:57 4 UCE-2?

02:58:57 5 MR. SINGER: They had been introduced on October
02:58:59 6 26th as the investors for Mr. Ndukwe, who he was trying to get
02:59:04 7 some money for in order to provide Sittenfeld --
02:59:06 8 Mr. Sittenfeld money in advance of the November 7th law
02:59:11 9 change.

02:59:16 10 THE COURT: Okay. Thank you. That's helpful.

02:59:37 11 MR. SINGER: Did Your Honor have anymore questions
02:59:38 12 relating to that specific area?

02:59:40 13 THE COURT: No, not -- I don't think so.

02:59:42 14 MR. SINGER: The only other thing I would mention,
02:59:44 15 Your Honor, is I don't believe that an issue can be preserved
02:59:50 16 to end around plain error review by raising it at post trial.

02:59:55 17 THE COURT: That would seem odd, I agree.

02:59:58 18 MR. SINGER: Nothing further.

02:59:59 19 THE COURT: Do you have any case law on that?

03:00:01 20 MR. SINGER: I do not, Your Honor. This was raised
03:00:04 21 for the first time, although I will say that the cases that we
03:00:08 22 did cite in our Rule 33 response applied plain error review
03:00:11 23 because they were not raised at trial. So, presumably, when
03:00:14 24 the issue came up post trial, that did not satisfy the
03:00:19 25 requirement that the objection is preserved.

03:00:22 1 THE COURT: Thank you.

03:00:27 2 MR. SINGER: If there is nothing further, thank you,
03:00:28 3 Your Honor.

03:00:29 4 THE COURT: Thank you.

03:00:30 5 Mr. Burnham.

03:00:31 6 MR. BURNHAM: Thank you, Your Honor.

03:00:35 7 THE COURT: Can we start with that last point first?

03:00:38 8 MR. BURNHAM: I was going to do reverse order. Yes,
03:00:41 9 that was my plan. Which point?

03:00:43 10 THE COURT: The point about you cite me any case law
03:00:46 11 that applies a non-plain error standard as something first
03:00:49 12 raised in post-trial motions?

03:00:51 13 MR. BURNHAM: No. The best I can do is that the
03:00:53 14 government didn't invoke plain error as to the indictment. It
03:00:56 15 only invoked it as to the instructions. And I do have a cite
03:00:59 16 that says they can forfeit the plain error objection when they
03:01:01 17 don't raise it specifically.

03:01:02 18 The look on your face suggests I should move on to plain
03:01:06 19 error, and I do think we have satisfied plain error. And I
03:01:08 20 would be much more comfortable, I think, with the Court just
03:01:11 21 thinking about it through that prism. The Tenth Circuit case
03:01:13 22 I commended to Your Honor is a very similar case.

03:01:17 23 And all of these -- sort of tortured reading we were just
03:01:20 24 talking about -- if I can just put this up for just a second.

03:01:24 25 THE COURT: Hang on. It's not up yet, Mr. Burnham.

03:01:27 1 MR. BURNHAM: Sorry. I am going to read you
03:01:28 2 something first then.

03:01:29 3 THE COURT: Oh, okay. Now it's up.

03:01:34 4 MR. BURNHAM: Here is what the government said in
03:01:35 5 closing argument. Let me just find you all the quotes. Hold
03:01:39 6 on.

03:01:40 7 "This also includes potentially the solicitation 'love
03:01:50 8 you but can't' in October 30, 2018. That element is
03:01:54 9 satisfied."

03:01:55 10 Later on they say, "The evidence shows that the
03:01:57 11 defendant" -- and I apologize. There is like four
03:01:59 12 transcripts. So the page numbers are all different. The one
03:02:02 13 I just read is from 5035 of ECF 251. The other quote is "The
03:02:08 14 evidence shows that the defendant corruptly solicited
03:02:11 15 Mr. Ndukwe on October 30th."

03:02:12 16 So this thing where he solicited Rob through Ndukwe, I
03:02:16 17 mean, that's just not what this says. It doesn't say that he
03:02:18 18 solicited Mr. Ndukwe for money to be paid by others. It
03:02:21 19 doesn't say that he solicited other people. It says, "He
03:02:24 20 directly corruptly solicited and demanded and accepted and
03:02:27 21 agreed to accept payments to his PAC for his benefit from
03:02:31 22 UCE-1." That's what it says.

03:02:33 23 UCE-1 was the object of the solicitation with UCE-1's
03:02:39 24 consent, which is the second part. And we also know that they
03:02:41 25 didn't charge it the way that my friend just suggested because

03:02:44 1 the counts vary about -- among who the object of the
03:02:47 2 solicitation is going to be. Some of them say UCE-1 and
03:02:51 3 UCE-2. They don't just say UCE-1.

03:02:55 4 And so in the conversation that counsel relied on,
03:02:57 5 Mr. Ndukwe is talking generically about unspecified investors.
03:03:00 6 It's not some specific conversation about Rob specifically,
03:03:03 7 and that's who you are going to go meet. And so the
03:03:05 8 solicitation has to match up with what the indictment says,
03:03:08 9 which is that it was of Rob directly, particularly when you
03:03:11 10 compare the indictment to what the government said in closing,
03:03:13 11 which was that he separately solicited Mr. Ndukwe.

03:03:16 12 And that's how they argue. They go through and say he
03:03:19 13 solicited Rob in the interaction of the lunch or what have you
03:03:22 14 and then he separately solicited Mr. Ndukwe. And I don't
03:03:25 15 think you can jam both of those solicitations, each of which
03:03:28 16 would be independent crimes in their view of things -- because
03:03:32 17 the crime, of course, is the solicitation or the agreement.
03:03:35 18 It's not the receipt of the payment -- and say that this
03:03:37 19 actually in its very specific language charges both of those
03:03:40 20 crimes.

03:03:41 21 The grand jury did not indict for both of those crimes.
03:03:44 22 It indicted for one crime -- a solicitation of Rob, not a
03:03:49 23 solicitation of Mr. Ndukwe.

03:03:50 24 We talked a lot about *Willoughby*. I think Your Honor had
03:03:53 25 it right, particularly with regard to a question on that last

03:03:54 1 point.

03:03:55 2 Okay. The only thing I would read, Your Honor, is that
03:04:00 3 the rule is not nearly as loose and sort of generous as the
03:04:04 4 government suggested. The rule from *Willoughby* is that,
03:04:06 5 quote, "Even if an adequate 924(c) charge need not name --
03:04:11 6 indicate by name a particular drug-trafficking offense, by the
03:04:12 7 way they framed the indictment in this case, the government
03:04:14 8 narrowed the legitimate scope of the weapons charge to
03:04:17 9 *Willoughby's* use of a firearm."

03:04:18 10 This case is from 1994. So I do not have the indictment
03:04:21 11 from this case. But I would be very surprised if it does not
03:04:24 12 comport with what the Seventh Circuit said, which is that they
03:04:27 13 can't mix and match across the counts the way that counsel
03:04:30 14 suggested.

03:04:30 15 The quote from *Farr* is even more straightforward. Had
03:04:33 16 the government --

03:04:33 17 THE COURT: I know, but I wonder, you heard me --

03:04:35 18 MR. BURNHAM: Yes.

03:04:35 19 THE COURT: -- talk with Mr. Singer. I am wondering
03:04:41 20 if a difference is that in 924(c) an element of the offense,
03:04:45 21 an actual element of the offense is an underlying crime that
03:04:48 22 you've used the gun in connection with, right? Because 924(c)
03:04:53 23 says if you use a gun in furtherance of some other crime.

03:04:57 24 MR. BURNHAM: Right.

03:04:57 25 THE COURT: So it's an actual element of 924(c) what

03:05:01 1 that other crime was.

03:05:02 2 MR. BURNHAM: Sure. But it's an element -- sorry.

03:05:05 3 Finish, Your Honor.

03:05:07 4 THE COURT: But here, is it an element of the

03:05:08 5 crime --

03:05:10 6 MR. BURNHAM: Well, the solicitation is, and you

03:05:12 7 can't solicit yourself. And so he committed -- and the way

03:05:15 8 the closing argument unfolded Mr. Sittenfeld committed two

03:05:18 9 crimes: He committed a crime with Mr. Ndukwe in October, and

03:05:22 10 a separate crime with Rob in November. That's how they argued

03:05:24 11 it.

03:05:24 12 Okay. In the indictment, he only committed one crime:

03:05:26 13 He committed a solicitation of Rob in November.

03:05:30 14 I take your point that the identity --

03:05:33 15 THE COURT: If the -- but I think they were arguing

03:05:34 16 that everybody on the one side was working together, and so

03:05:39 17 the crime was taking money from the group in exchange for

03:05:44 18 supporting the group's project. And there could be different

03:05:48 19 people in the group at different times giving money, but the

03:05:53 20 idea was the group --

03:05:53 21 MR. BURNHAM: I --

03:05:54 22 THE COURT: -- the types of UCE-1, this group was

03:05:57 23 operating at the direction of UCE-1 and was trying to get 435

03:06:01 24 Elm approved.

03:06:01 25 MR. BURNHAM: So I don't dispute that they argued it

as this kind of blob that he was soliciting from. I think the problem they have is that the indictment is much more precise than that, and that the particular interactions with Ndukwe that they are trying to rely on just don't connect through the charged count the way that they want them to because the count says that he solicited Rob. And that to me is the key problem that they've got.

And the element point I don't think works in all the cases about the Mossberg shotgun versus the rifle. And there is a lot of cases where the underlying identity of the firearm or the identity of the false statement is not an element. Yes, a false statement is an element, but what type of false statement is not an element.

So in the Tenth Circuit 2018 case on plain error, the accountant -- not the accountant. I'm sorry -- the pharmacist filled out a form, checked two boxes. The government said at trial both were lies but they had only indicted on one, and the Court said that doesn't work. And --

THE COURT: That's in the Tenth Circuit.

MR. BURNHAM: Yes, Your Honor. That's *Murphy*. It's in our brief.

The other case that I think is constructive is a case called *Ford* that is definitely in our brief. I don't have the cite. It's a Sixth Circuit case, so that is important. And there they said, "gun possession on or about September 28,

1 1987." There was a separate possession on August 9, 1987, so
2 about a month and a half earlier. And the Court -- the
3 instruction said the time frame could include any date from
4 November 2, 1986, the date he allegedly purchased the firearm,
5 up until the date of September 28, 1987, the date of the
6 alleged domestic violence incident in his home.

7 The court said that was a constructive amendment because
8 it is, quote, "possible that the jury convicted *Ford* based on
9 an incident of possession not intended by the grand jury to be
10 part of the charge."

11 It's a very similar situation where the charge is very
12 specific, and the government tried to rely on something very
13 similar and indeed related and tried to say that they combat.
14 I think the "to wit" phrase is just a very specific thing, and
15 I think when Your Honor reads it, hopefully you will agree
16 with us about that.

17 That's all I had on constructive amendment unless Your
18 Honor -- okay.

19 On the -- back to the bribery counts. So let's just walk
20 through just a few quick points, Your Honor. So, again,
21 *Blandford* -- there is two things going on in *Blandford*.
22 *Blandford* is not a campaign contribution case. So the
23 government is trying to mix and match parts of *Blandford* to
24 say that it conflated the campaign contribution standard with
25 the non-campaign contribution standard. That is wrong.

03:08:26 1 *Blandford* comes right after *Evans*, when there is a bunch of
03:08:29 2 controversy about whether you even need a quid pro quo in the
03:08:32 3 first place for a Hobbs Act count, or for a Hobbs Act
03:08:35 4 conviction.

03:08:36 5 And so *Blandford* is trying to figure out what to do with
03:08:38 6 *McCormick* and *Evans* in a non-campaign contribution case. The
03:08:41 7 key quote in *Blandford* is in the footnote, where it says what
03:08:45 8 explicit means. And that's where it says, quote, "Not obscure
03:08:46 9 or ambiguous, having disguised meaning or reservation, and
03:08:46 10 then the --

03:08:46 11 (Mr. Burnham was asked to slow down by reporter.)

03:08:54 12 MR. BURNHAM: And then the Court itself italicized
03:08:56 13 "clear in understanding." That's in -- italicized in their
03:09:00 14 opinion in Footnote 13.

03:09:02 15 The point I'm making is just that the legal rule the
03:09:05 16 Sixth Circuit adopts -- indicative, to be sure, because this
03:09:10 17 is not a campaign case -- is the same rule that we're urging
03:09:13 18 on the Court today and the same rule that Judge Oetken applied
03:09:17 19 in the opinion I handed Your Honor.

03:09:18 20 It's true, he does say in a footnote that the Sixth
03:09:21 21 Circuit law appears to be different. I think that is not the
03:09:23 22 right reading of *Blandford*. Because I think if you actually
03:09:26 23 read it pretty carefully, it says, no, we have the campaign
03:09:29 24 cases and then we have the non-campaign cases, and we are
03:09:34 25 going to do something different in the non-campaign cases.

03:09:37 1 The other point I would make is the issue in *Evans* that
03:09:40 2 the Court was resolving in the quotes that were talked about a
03:09:43 3 few minutes ago was whether you had to have an affirmative
03:09:46 4 inducement of the victim for a Hobbs Act, right, because Hobbs
03:09:49 5 Act is an extortion statute. And what the Court said is you
03:09:51 6 don't need inducement.

03:09:52 7 So a lot of the quotes that counsel was giving Your Honor
03:09:55 8 are not about how specific or clear the quid pro quo needs to
03:09:59 9 be. They are in the Court's discussion of inducement.

03:10:01 10 On the quid pro quo, it's important to bear in mind that
03:10:05 11 *Evans* is not about campaign contributions. In that case, the
03:10:07 12 defendant took \$7,000, reported it on no forms, taxes or
03:10:11 13 campaign, and pocketed it. There is some discussion in the
03:10:14 14 background about campaign contributions because that's how the
03:10:17 15 defendant had defended it. There is a long quote from the
03:10:20 16 jury instructions. That's --

03:10:21 17 THE COURT: So *Evans* is not a campaign?

03:10:23 18 MR. BURNHAM: It's very unclear because the issue
03:10:25 19 the Court granted cert on was whether or not you had to have
03:10:28 20 inducement in a Hobbs Act case and whether the instructions in
03:10:31 21 that case were okay.

03:10:34 22 What the Court's operative discussion --

03:10:36 23 THE COURT: I am pushing back only --

03:10:38 24 MR. BURNHAM: Please.

03:10:40 25 THE COURT: -- because while what we are talking

03:10:41 1 reading *Blandford* here --

03:10:41 2 MR. BURNHAM: The Sixth Circuit here --

03:10:42 3 THE COURT: -- the Court says, I quote, "Our reading
03:10:43 4 of *Evans* -- as limited to the campaign contribution
03:10:45 5 context" --

03:10:45 6 MR. BURNHAM: Right.

03:10:46 7 THE COURT: "-- is bolstered by the fact that the
03:10:48 8 case, after all, involved campaign contributions."

03:10:50 9 MR. BURNHAM: Right. I think that is -- I don't
03:10:52 10 mean to suggest that -- the Sixth Circuit has certainly said
03:10:55 11 that *Evans* is important to what the Court's supposed to think
03:10:58 12 about in the campaign contribution context. So I am not
03:11:00 13 suggesting that the Court should disagree with that. I am
03:11:02 14 just saying I don't actually think that's the right reading of
03:11:05 15 *Evans*.

03:11:05 16 And in *Blandford*, the Court doesn't really have to get
03:11:08 17 into all of that because *Blandford* is, of course, not a
03:11:10 18 campaign contribution case.

03:11:12 19 Then in theory, Judge Sutton comes along and is presented
03:11:15 20 with the sale conundrum that so many others have between these
03:11:18 21 two cases. And the way he deals with it in *Terry* is he says,
03:11:21 22 look, the rule is *McCormick*. *Evans* tells us it doesn't have
03:11:24 23 to be express because one interpretation of explicit could be
03:11:27 24 express, certainly. And in this case, it's easy because, you
03:11:31 25 know, the judge was so obviously corrupt that there is no

03:11:33 1 other inference you could draw.

03:11:36 2 So I think certainly *Evans* is relevant. I am just saying
03:11:38 3 the thing about knowing it was in exchange for official acts
03:11:41 4 is not the Supreme Court's definition of the specificity
03:11:44 5 required for a campaign contribution bribe. That is not what
03:11:47 6 *Evans* held, that is not what the lower courts have said it
03:11:49 7 held, and that would not be a permissible rule because that
03:11:52 8 would indeed make gratuities come within the net. That's all
03:11:57 9 I -- that's the only point I wanted to make on that.

03:11:58 10 Two more quick, very quick points. Characterization -- I
03:12:01 11 think it's important to draw a distinction between sort of
03:12:06 12 characterizing a statement and drawing a rational inference.
03:12:08 13 And so, yes, we can characterize any statement as inculpatory
03:12:12 14 if we want to, but I think what the Court's job is to do, as
03:12:15 15 we have talked about, is take all the evidence and then figure
03:12:17 16 out whether a reasonable inference -- that a reasonable juror
03:12:22 17 could draw the inference of criminality according to the
03:12:24 18 standard that we've talked about beyond a reasonable doubt.

03:12:27 19 This is a uniquely easy case in which to do this because
03:12:30 20 all of the important interactions are recorded. So the Court
03:12:33 21 can listen to them over and over or as many times as you
03:12:37 22 want -- I've done it a lot -- and the Court can figure out
03:12:40 23 what is a reasonable inference to draw according to this high
03:12:42 24 standard.

03:12:43 25 The last point I would make, Your Honor asked me about

whether I had any Rule 29 opinions in the campaign context, and I have not yet located one, but here's why: Every other case is miles beyond this. I mean, truly, if you go through the opinions, particularly if you go to the district court opinions, it is very clear that these are hardcore fraud schemes where, yes, it is -- sometimes the campaign contributions aren't reported, they are being pocketed, they are being diverted. The people are talking about burner phones. There is coded language. It's *Blagojevich*. I mean, the reason why is because the department does not normally bring cases like this. The only case that's even kind of close is *Siegelman*, but even in *Siegelman*, which I think is a close case, *Siegelman* had acknowledged to his aide that the money was coming in in exchange for a seat on the CON Board, which was the board that hands out healthcare facilities in Alabama. It decides how many there is going to be. So you had direct acknowledgment from the defendant that he knew these things were going to be exchanged with each other.

There is nothing like that here at all. There is not a shred of evidence that I am aware of in which Mr. Sittenfeld makes clear either by deed or word that he understands he is being bribed to support a redevelopment project three blocks away from this courthouse. And to me that is a huge evidentiary gap, particularly in a case where the government designed everything, recorded everything, and tried millions

03:14:05 1 of times to induce Mr. Sittenfeld into saying something or
03:14:08 2 admitting something along those lines. I just don't think the
03:14:11 3 evidence can fly in this context.

03:14:13 4 Thank you, Your Honor.

03:14:14 5 THE COURT: Are we good? Do you have something else
03:14:25 6 you want to say?

03:14:26 7 MR. SINGER: Am I permitted to make any follow-up
03:14:28 8 comments?

03:14:28 9 THE COURT: Very brief. Go ahead.

03:14:29 10 MR. SINGER: If the Court is satisfied --

03:14:32 11 THE COURT: No, no. If you heard something new you
03:14:33 12 want to comment on, go ahead.

03:14:34 13 MR. SINGER: I mean, just very briefly, Your Honor.
03:14:36 14 I would note that the facts that were incorporated include the
03:14:40 15 date range, and the date range includes that -- that is
03:14:44 16 charged in the indictment, that is charged in Count 3 includes
03:14:47 17 the October 30th "love you but can't." So that is
03:14:51 18 incorporated in. Rob is specifically mentioned in paragraph
03:14:55 19 13.

03:14:55 20 THE COURT: I saw that.

03:14:56 21 MR. SINGER: In the "love you but can't." It's the
03:15:00 22 same money that we're talking about on October 30th that leads
03:15:03 23 to the December 17th payments.

03:15:06 24 As for the Rule 29, Your Honor, *Blandford* is a published
03:15:14 25 Sixth Circuit case. It controls. This Court's instructions

03:15:18 1 mirrored the law that's set forth in *Blandford* and reinforced
03:15:23 2 in *Terry*.

03:15:26 3 If there are no further questions, the government rests.

03:15:28 4 THE COURT: I don't think so. Thank you.

03:15:30 5 All right. Well, this case has not been under-
03:15:35 6 litigated, I'll give it that. So you have given the Court a
03:15:38 7 lot to think about. I will try to do that as promptly as
03:15:41 8 possible and get something out on these motions.

03:15:46 9 I think I am ready to recess.

03:15:48 10 THE COURTROOM DEPUTY: All rise. This court is
03:15:51 11 adjourned.

03:15:52 12 (Proceedings concluded at 3:16 p.m.)

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1 CERTIFICATE OF REPORTER

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3 I, Mary A. Schweinhagen, Federal Official Realtime
4 Court Reporter, in and for the United States District Court
5 for the Southern District of Ohio, do hereby certify that
6 pursuant to Section 753, Title 28, United States Code that the
7 foregoing is a true and correct transcript of the
8 stenographically reported proceedings held in the
9 above-entitled matter and that the transcript page format is
10 in conformance with the regulations of the Judicial Conference
11 of the United States.

12
13 s/Mary A. Schweinhagen

14 _____ 16th of December, 2022

15 MARY A. SCHWEINHAGEN, RDR, CRR
16 FEDERAL OFFICIAL COURT REPORTER
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Mary A. Schweinhagen, RDR, CRR (937) 512-1604